APPENDIX A.

1. Federal Statute Involved.

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935.

Court Review of Orders.

Sec. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding be-

fore the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

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2. Missouri Statutes Involved.

R. S. Mo. 1949, Sec. 351.245 (4):

A shareholder may vote either in person or by proxy executed in writing by the shareholder or by his duly authorized attorney in fact . . .

R. S. Mo. 1949, Sec. 351.290:

The power to make, alter, amend, or repeal the bylaws of the corporation shall be vested in the shareholders, unless and to the extent that such power may be vested in the board of directors by the articles of incorporation. The bylaws may contain any provisions for the regulation

and management of the affairs of the corporation not inconsistent with law or the articles of incorporation.

R. S. Mo. 1949, Sec. 351.385.

In order to carry out the purposes for which it is organized, each corporation shall have power . . .

(11) To make and alter bylaws, not inconsistent with its articles of incorporation or with the laws of this state, for the administration and regulation of the affairs of the corporation; . . .

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3. **Findings and Opinion of the Commission.**

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C.
March 21, 1958

In the Matter of

Union Electric Company
File No. 68-169
(Public Utility Holding Company Act of 1935)

} Findings and Opinion of the Commission

Solicitation of Proxies

Declaration filed pursuant to Section 12 (e) of the Public Utility Holding Company Act of 1935 and Rule U-62 promulgated thereunder, with respect to proxy solicitation material proposed to be mailed by management of registered holding company, **permitted to become effective**, provided the proxy solicitation material is amended in certain respects, the Commission finding no basis for concluding that the material as so amended could not appropriately be sent to stockholders.

Appearances:

John A. Woodbridge, and Robert J. Keefe, of Keefe, Koerner, Schlafly & Griesedieck.

J. Raymond Dyer, pro se and for Nancy Corinne Dyer.

Solomon Freedman and Joseph S. Mitchell, Jr., for the Division of Corporate Regulation of the Commission.

These proceedings relate to a declaration filed by Union Electric Company ("Union"), a registered holding company, under Section 12 (e) of the Public Utility Holding Company Act of 1935 ("Holding Company Act")[1] and Rule U-62 promulgated thereunder,[2] with respect to the solicitation of proxies in connection with Union's Annual Meeting of Stockholders for the year 1958. The declaration was filed pursuant to an order entered by us on October 25, 1957 which provided that no solicitation of proxies in connection with such meeting could be effected

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[1] Section 12 (e) of the Holding Company Act provides:

"It shall be unlawful for any person to solicit or to permit the use of his or its name to solicit, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, any proxy, power of attorney, consent, or authorization regarding any security of a registered holding company or a subsidiary company thereof in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder."

[2] Rule U-62 provides in pertinent part:

"No solicitation of any authorization, regarding any security of a registered holding company or a subsidiary company thereof, in connection with any reorganization subject to the approval of the Commission, or in connection with any other transaction which is or will be the subject of an application or declaration filed with the Commission, shall be made except pursuant to a declaration with respect to such solicitation which has become effective in the manner prescribed in paragraph (c) of this rule."

unless such declaration had been filed and been permitted by us to become effective. That order also provided that any interested person might request a hearing upon the declaration.

J. Raymond Dyer, a stockholder of Union, on behalf of himself and his daughter, Nancy Corinne Dyer, also a Union stockholder, filed objections to Union's declaration as amended and requested a hearing thereon. After due notice a hearing was held at which Dyer and his daughter were granted leave to be heard and to participate pursuant to Rule XVII of our Rules of Practice, following which our Division of Corporate Regulation ("Division") and Dyer filed recommended findings and conclusions, Dyer filed exceptions to the Division's recommendations and a brief in support of such exceptions, and we heard oral argument. The following findings are based upon an independent review of the record.

I. Dyer's Objections.

Dyer has raised a number of objections to Union's declaration and proxy solicitation material. His objections relate principally to Union's inclusion or exclusion of statements regarding a proposal of its own, to Union's statements in opposition to certain of Dyer's proposals which are included in management's proxy material, and to the omission from Union's proxy material of certain other proposals which Dyer has submitted.

This Commission's general policies regarding proxies are set forth in Regulation X-14 promulgated under Section 14 (a) of the Securities Exchange Act of 1934. Rule U-61 promulgated under Section 12 (e) of the Holding Company Act makes the requirements of Regulation X-14 applicable to the solicitation of proxies by a registered holding company, except in connection with a reorganiza-

tion or transaction which is the subject of an application or declaration. In considering Union's proposed proxy solicitation material and the objections that have been raised thereto, we have recognized that the provisions of Regulation X-14 should be applied except to the extent that special circumstances may require the imposition of different or additional requirements.[3]

A. Objections Relating to Management's Proposal to Increase Authorized Common Stock.

1. Union's management seeks stockholder approval of an amendment to Union's articles of incorporation to provide for an increase in the authorized shares of its common stock. Dyer objects to the failure of the proxy statement to include financial statements and objects to the management's statement that financial statements are not included in the proxy statement since they are not deemed material for the exercise of prudent judgment on the proposed amendment. We find no merit in Dyer's contention that management be required to include financial statements in order to inform stockholders of the present equity of their stock.

Item 15 of Schedule 14A of our proxy rules provides that financial statements must be included in proxy statements under certain circumstances. However, paragraph (c) thereof specifically states that financial statements are not deemed material and therefore may be omitted "in cases involving the authorization or issuance of common stock, otherwise than in exchange". Thus under our proxy rules management is not required to include financial statements in this case, and we see nothing unusual in connection with the company's proposal to increase its

[3] See *Union Electric Company*, Holding Company Act Release No. 13450, page 4 (April 17, 1957). Petition for review dismissed as moot, *Dyer v. S. E. C. et al.*, ... F. 2d ..., (C. A. 8, January 24, 1958), petition for rehearing denied, February 25, 1958.

authorized stock that requires the application of a rule different than that prescribed in Item 15 of Schedule 14A.

2. The management's statement in support of its proposal to increase the authorized common stock explains the existing limitations on preemptive rights of stockholders, as is required by our proxy rules. Dyer objects to the failure to state additionally that these limitations may be amended by a vote of the stockholders. Such a statement is not required by the rules and its omission does not appear to be misleading in violation of the rules. We find no implication in the proxy statement that the present provisions of the articles of incorporation with respect to preemptive rights may not be amended. We are of the opinion that no basis has been shown for imposing a special requirement in this case that it be stated affirmatively that such amendment may be made, or for requiring, as Dyer has suggested, that management present a proposal for such an amendment in connection with its proposed increase in the amount of authorized common stock.

3. The management states that its proposal to amend the articles of incorporation to increase the amount of authorized common stock requires the affirmative vote of the record holders of a majority of all the outstanding common and preferred shares of the company. Dyer contends that under the articles of incorporation a two-thirds vote is required. It appears, however, that the provision of the articles requiring a two-thirds vote applies only to the amendment of certain specified sections of the articles and is not applicable to an amendment to increase the authorized common stock.

4. Dyer has offered for inclusion in the management's proxy statement a statement of his own opposing the management's proposal to increase the authorized common stock. The Commission's proxy rules contain no provision

requiring management to include such opposition statements by stockholders in its own proxy material and no special circumstances have been shown to justify making an exception in this case.

B. **Objections to Management Statements Relating to Dyer's Proposals.**

1. In connection with two of the four Dyer proposals which management has included in its own proxy material, Dyer complains that management's statements in opposition thereto are in excess of 100 words. He argues that since he is limited by Rule X-14A-8 to statements of 100 words each in support of his proposals, the management should be limited to 100 words in opposing them. But as Dyer recognizes, the proxy rules do not impose a limitation on the length of statements management may include in its own proxy material. The 100-word limitation is a reasonable qualification of the right which the Regulation gives a stockholder to have included in the management's proxy material, at the expense of the corporation, a statement in support of his own proposal. The same considerations do not apply to statements made by management in its own material. Again, Dyer has presented no unusual circumstances which require the imposition of a special limitation on the length of management's statements in its own proxy material.

2. Dyer objects on a number of grounds to management's statement in opposition to his proposed amendment to the by-laws which would prohibit the company from engaging in certain types of advertising. Dyer's objections essentially are that the management's arguments against his proposal are invalid and tend to present his proposal as one in favor of socialization of public utilities which he asserts it is not. However, Dyer and management are entitled to state their views in support of and against

Dyer's proposal in such manner as they choose, so long as their statements are not false or misleading. We do not find management's statement, which is in the form of an expression of its opinion, to be false or misleading, and we find no basis for requiring it to change its statement.

3. In connection with certain proposals by Dyer to amend the company's by-laws, the proxy statement states that a vote of a majority of the outstanding shares is necessary for adoption of such amendments. Dyer objects to this statement and refers to sections of Missouri statutes which he claims provide that a majority of the shares voted at a meeting at which a quorum is present is sufficient unless a different provision is made in the articles. Union's by-laws provide that they may be amended by the vote of a majority of the shares outstanding and Union's counsel has advised the company that this provision of the by-laws is valid under Missouri law. Under these circumstances we are of the opinion that if the management statement retains the present statement regarding the vote required, it should indicate that Dyer has raised the question regarding the vote required for amendment, but that in the opinion of company counsel the by-law provision is valid under Missouri law.[4]

4. Management's proxy is in the usual form which authorizes the holder of the proxy to vote for the election of directors, provides means whereby a stockholder may direct a vote for or against the management's proposal and each of the four proposals by Dyer which the management has included pursuant to Rule X-14A-8, and states that "This proxy will be voted as directed on the foregoing proposals, but if no such direction is specified, this proxy will be voted for the amendment to the Articles of

[4] For the same reason, the management's statement that Dyer's proposal No. 2 received last year less than 27% of the "requisite" vote should be appropriately revised.

Incorporation and against Stockholder Proposals 1, 2, 3 and 4." Dyer objects to this last statement[5] on the ground that it deprives a stockholder of the opportunity to abstain from voting on one or more of the proposals. Rule X-14A-4 (b) specifically permits the statement to which Dyer objects, and we find nothing in the circumstances of this case to require its exclusion here. It may also be noted that a stockholder wishing to abstain from having his shares voted on any matter may do so by crossing out the proviso to which Dyer objects or by other appropriate deletion or insertion.[6]

Management's form of proxy also gives the proxy holder discretionary authority to vote on all matters which may come before the meeting. The proxy statement indicates this authority will be exercised to vote against the seven proposals submitted by Dyer which have not been set forth in the proxy statement but which are identified briefly in the notice of meeting. Dyer has objected to these provisions. Rule X-14A-4 specifically permits the form of proxy to grant discretionary authority with respect to stockholder proposals omitted from a proxy statement pursuant to Rule X-14A-8, and the situation here comes within the scope of that Rule. It appears, as indicated above, that the stockholder may deny the authority in question by deletion or insertion in the form of proxy. We find no basis for requiring the exclusion of the provisions to which Dyer has objected.

5. Management's form of letter to be supplied to brokers who are record holders of stock, for their use in trans-

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[5] Dyer also objects to a statement to the same effect contained in the proxy statement.

[6] Union's Secretary and Treasurer testified that the company has in the past received proxies with lines run through proposals or language crossed out, leaving authority only for voting for the election of directors and that such proxies were counted solely for the election of directors.

mitting to the beneficial owners of such stock the management's proxy statement and a form of proxy authorization which the beneficial owner may execute and return to the broker instructing him how to vote the shares,[7] states, among other things, that under the rules of the New York Stock Exchange the broker cannot vote shares on the stockholder proposals set forth in the proxy statement without instructions from the beneficial owner of the shares and that, if no instructions have been received from the beneficial owner by the tenth day before the meeting, the broker may furnish the management a proxy in favor of the election of directors as proposed and in favor of the management's proposal but shall delete the portion of the proxy which pertains to the stockholder proposals. Dyer has objected to this statement, pointing out that not all brokers to whom the letter will be furnished are known to be members of the New York Stock Exchange. However, the statement in question is in accord with the rules of the New York Stock Exchange,[8] and if the broker is not a member of this Exchange he need not use the form of letter supplied. We find Dyer's objection to the statement to be without merit.

6. The management has included in its proxy material a proposal by Dyer to amend the by-laws "so as to render

[7] The management has also filed a form of proxy authorization for transmittal by the brokers to beneficial owners. This form is similar to the management's form of proxy discussed above and both this form and the transmittal letter indicate that, if the beneficial owner signs the form without otherwise marking it to specify a vote for or against the proposals listed, it is understood that his shares will be voted as recommended by the management on all matters to be acted upon at the meeting. Dyer's objections to these provisions of the transmittal letter and form of proxy authorization are similar to his objections to similar provisions in the management's proxy statement and proxy form discussed above, and for the reasons set forth we find no basis for requiring any change in this respect in the material filed.

[8] See New York Stock Exchange Rules 451 and 452.

invalid, for use at any stockholders' meeting, any proxy ballot that restricts the right of the stockholder signing the same to vote for or against any proposition, or to refrain from voting thereon." Dyer has objected to two sentences in the management's statement in opposition to this proposal. The first of these states: "A substantial number of stockholders who send in their signed Proxies without specifying a choice would be disenfranchised from voting on proposals if such authority were not conferred upon their appointed agents." We find no basis for this statement. A form of proxy which permitted a stockholder to vote for or against any proposition or refrain from voting on it would clearly not disenfranchise the stockholder. This sentence should therefore be omitted from the proxy statement.

Dyer also objects to the management's statement that his proposal is "an unwarranted attempt to interfere with the individual rights of stockholders in delegating authority to those whom they are willing to appoint as their proxy agents at stockholders' meetings." It appears to us that in the context of Dyer's statement in support of the proposal and the remainder of the management's statement in opposition, the statement in question is within the permissible range of advocacy.

C. Objections to the Omission of Certain of Dyer's Proposals.

Under Rule X-14A-8 the management is required under certain circumstances to include in its proxy statement proposals submitted by a security holder which he intends to present for action at the meeting for which proxies are being solicited. Rule X-14A-8 (c) contains certain exceptions to this requirement, permitting the management to omit such proposals under certain circumstances. Dyer and his daughter submitted to Union 11 proposals, of which

four were included by Union in its proxy material and seven were omitted.

1. Three of Dyer's proposals were omitted on the ground that they had been included in the management's proxy material for the 1957 annual meeting of stockholders and that each of these proposals had received less than 3% of the total number of votes cast thereon at that meeting. Under these circumstances Rule X-14A-8 (c) (4) (i) permits the management to omit the same or substantially similar proposals from its proxy material for a period of three years.

Dyer argues that certain of the proxies voted at the 1957 meeting against these proposals were invalid and that if such proxies were disregarded each of the proposals would have received more than the required 3% of the votes. Dyer's argument is based on the fact that the management's form of proxy used in 1957 like that proposed for use this year, carried the statement that if no vote was specifically marked either for or against these proposals the proxy would be voted against them. As indicated above, Rule X-14A-4 permits the voting of proxies containing such a statement. Dyer contends that in this respect the rule is invalid. We do not agree and find no merit in his contention that the 1957 proxies were invalid as alleged. Management's omission of these three proposals from its proxy soliciting material is in accord with the proxy rules.

2. Two of Dyer's omitted proposals provide that "false or deceptive advertising by the company, and false or deceptive communications by the company to its stockholders, be outlawed, and that the officers and directors of the company be divested of all authority to expend corporate funds for either of those purposes." One of the proposals is in the form of a resolution, the other in the form of an amendment to the by-laws; in other respects they are identical.

The Division and Union take the position that the management should be permitted to omit these proposals since they would be ineffectual, providing nothing to which the management is not already bound by business ethics or by law. Dyer admits that false advertising is a crime under Missouri law, but argues that adoption of the proposed by-law, by making false advertising and communications to stockholders ultra vires, would provide the stockholders with a remedy against such activity which they do not now have. However, the opinion of counsel submitted by management with respect to these proposals takes the position that the officers and directors of the company do not now have authority, as between themselves and the company, to expend corporate funds for such advertising or communications, and we find the statement of reasons for this opinion cogent.

An almost identical Dyer proposal was omitted from management's proxy soliciting material for the 1957 stockholders' meeting, and we found that such omission was permissible under Rule X-14A-8(c) (5).[9] We see no reason for taking a different view with respect to Dyer's proposals for the 1958 meeting. In so ruling, we emphasize, as we did in our previous opinion, that we do not mean to suggest that it is proper for a company to issue false advertising or communications to stockholders.

3. Another omitted Dyer proposal would amend Union's by-laws to provide "that the company accord to the father and/or mother, or guardian, of a minor stockholder (whichever is legally entitled thereto) all rights incident to stock ownership that it accords stockholders who have reached their majority." The management has presented an opinion of counsel citing statutory authority that the according of such rights would be contrary to the law of Missouri. We find that the proposal is not a proper sub-

[9] *Union Electric Company*, Holding Company Act Release No. 13450 (April 17, 1957).

ject for stockholder action under the law of Missouri and that the proposal may therefore be omitted from management's proxy material under Rule X-14A-8 (c) (1).[10]

4. A further proposal by Dyer would amend Union's by-law, which provides that a stockholder may vote in person or by proxy, to further provide "whether or not such holder of record be a minor, and all such stockholders may exercise all other of their stock rights by power of attorney." The St. Louis Court of Appeals has recently held, in litigation between Dyer and Union, that a minor cannot appoint an agent under the laws of Missouri. Dyer states he intends to take an appeal from this decision. However, on the record before us we find that at this time this proposal is not a proper subject for stockholder action under the laws of the domicile of Union, and management therefore may omit it pursuant to Rule X-14A-8 (c) (1).[11]

D. **Other Objections.**

1. Dyer objects to the failure of Union to state in its proxy statement the specific amounts of remuneration paid to each of its directors and officers in 1957. Item 7 of Schedule 14A of the Commission's proxy rules provides that a company need only state the remuneration paid to each director and to each of the three highest paid officers of a company whose direct aggregate remuneration exceeds

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[10] Rule X-14A-8 (c) (1) permits the omission of a stockholder proposal which under the law of the issuer's domicile is not a proper subject for action by security holders.

[11] The latter portion of this proposal does not deal solely with the power of a minor to appoint an agent but also deals with the power of an adult to appoint an attorney to exercise the adult's right as a stockholder. It is to be noted that Dyer's 100-word statement in support of his proposal deals solely with the question of the rights of minors, and when this was called to his attention at the hearing he failed to suggest an alternative statement. Under the circumstances we think the proposal must be treated as a whole and find that it may be omitted from the proxy material.

$30,000, and this management has done. We find no special circumstances requiring additional disclosure in this case.

2. Dyer contends that an advertisement by Union and other material which the management has transmitted to stockholders was false or misleading, constituted solicitation material, and therefore should be rectified in the proposed proxy statement. The most recent of these transmittals are quarterly reports to stockholders dated June 12 and September 13, 1957. In our opinion all of this material is too remote from the presently proposed solicitation to be considered under the circumstances as preliminary solicitation material. Whether such material contained false or misleading statements is therefore not an issue in these proceedings and we find that the hearing examiner properly rejected as exhibits both copies of such material and other documents offered to show the falsity of such material and properly denied Dyer's offers of proof and request for the issuance of subpoenas in connection therewith. We further find that the hearing examiner properly denied Dyer's offer of proof concerning the accuracy of certain testimony of Union's president in the hearings with respect to management's proxy material for the 1957 meeting of stockholders. The present proceedings are not a proper forum for the raising of this matter since the accuracy of such testimony is not an issue herein.

We have considered Dyer's other objections to Union's declaration and the rulings of the hearing examiner and find them without merit.

II. Other Matters.

A. Fees and Expenses.

This proceeding also concerns the question whether the expenses proposed to be incurred by Union in connection with its proxy solicitation are appropriate and in accordance with the applicable standards of Section 12 (e) of the

Holding Company Act and Rules promulgated thereunder. Rule U-65 provides that, except pursuant to a declaration which has been permitted to become effective, no registered holding company may expend any money in connection with the solicitation of any proxy regarding any security of such company. An exception permits a company to expend sums for "ordinary expenses in connection with preparing, assembling, and mailing proxies . . .; or other expenditures not in excess of $1,000 during any one calendar year."

Union has estimated that it will expend $22,000 in connection with the soliciting of proxies for its 1958 annual meeting and asserts that the expenses of its solicitation are ordinary expenditures in connection with assembling and mailing proxies, proxy statements and accompanying data within the meaning of Rule U-65. Union has furnished the material it proposes to send to shareholders upon the effectiveness of the declaration. This material has been examined and it appears that it comes within the definition of "ordinary expenditures", in connection with proxies, as contemplated by Rule U-65 (d).

Union further states that it has no present intention of engaging in any further activities in connection with the solicitation of proxies for the 1958 annual meeting of stockholders,[12] and that, if any change in this regard should occur, it will be reported promptly to us. Union has consented to the reservation of jurisdiction by us with respect to any additional type of solicitation it may engage in in the future with respect to the 1958 annual stockholders' meeting.

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[12] Except that Union states in its declaration that proxies may be solicited by personal interview, or by telephone or telegraph, and banks, brokers, nominees and other custodians and fiduciaries may be reimbursed for their reasonable out-of-pocket expenses in forwarding soliciting material to their principals, the beneficial owners of stock of Union. Proxies may be solicited by officers, directors and key employees of Union on a voluntary basis without compensation therefor.

B. **Effective Date of Order.**

Union has requested that there be no waiting period between the issuance of our order and the date of its effectiveness. Dyer has objected to this request. We find no legal requirement or other reason for withholding the effectiveness of our order and it shall become effective upon the filing of the amendments required herein. Our order will reserve jurisdiction to pass upon any additional solicitation material proposed to be used by Union which material shall be filed as a post-effective amendment herein and which material, unless the Commission orders a hearing thereon, may be used for solicitation after five business days have elapsed from the filing thereof or after such shorter period as the Commission may authorize upon good cause shown.

III. **Conclusions.**

In the light of the findings set forth above we conclude that Union's declaration may be permitted to become effective upon the filing of a further amendment which deletes from the proxy material the sentence, found in management's statement in opposition to "Stockholder Proposal No. 1," that states, "A substantial number of stockholders who send in their signed Proxies without specifying a choice would be disenfranchised from voting on proposals if such authority were not conferred upon their appointed agents," and which appropriately revises the statements referred to above which are affected by the question of the vote required to amend Union's by-laws.

By the Commission (Chairman Gadsby and Commissioners Orrick, Patterson, and Hastings), Commissioner Sargent being absent and not participating.

ORVAL L. DuBOIS,
Secretary.

4. Administrative Orders Involved.

United States of America
before the
SECURITIES AND EXCHANGE COMMISSION
March 21, 1958

In the Matter of Union Electric Company File No. 68-169 (Public Utility Holding Company Act of 1935)	Order Permitting Declaration Regarding Solicitation of Proxies to Become Effective.

The Commission having by order dated October 25, 1957 (Holding Company Act Release No. 13575) prohibited Union Electric Company ("Union"), a registered holding company, and all other persons from soliciting any proxy or other authorization regarding the voting of any security of Union in connection with the annual meeting of Union's stockholders to be held April 21, 1958 except pursuant to a declaration, filed under Section 12 (e) of the Public Utility Holding Company Act of 1935 ("Act") and Rule U-62 promulgated thereunder, which shall have been permitted by the Commission to become effective.

Union having thereafter filed a declaration and amendments thereto in regard to its proposed solicitation of proxies in connection with such meeting and the expenditure of corporate funds in furtherance thereof.

A public hearing having been held after appropriate notice (Holding Company Act Release No. 13696), J. Raymond Dyer, a Union stockholder, was granted leave to participate on behalf of himself and his daughter, Nancy Corinne Dyer, also a Union stockholder, recommended findings and conclusions having been filed by the Commis-

sion's Division of Corporate Regulation and by Dyer and Dyer having filed exceptions to the Division's recommended findings and conclusions and a supporting brief, and the Commission having heard oral argument;

The Commission, having this day issued its Findings and Opinion; on the basis of said Findings and Opinion

It Is Ordered that Union's declaration shall become effective upon the filing of an amendment, as stated in the Commission's Findings and Opinion, deleting from the proxy solicitation material the statement that Dyer's proposal to prohibit the use of restrictive proxies would disenfranchise stockholders and appropriately revising statements in the material as filed which are affected by the question of the vote requisite to amend Union's by-laws.

It Is Further Ordered that jurisdiction be, and hereby is, reserved with respect to the following:

(a) To determine the appropriateness of any solicitation of proxies for its annual meeting to be held April 21, 1958 which Union may propose to engage in other than that presently proposed.

(b) To pass upon any additional solicitation material proposed to be used by Union which material shall be filed as a post-effective amendment herein and which material, unless the Commission orders a hearing thereon, may be used for solicitation after five business days have elapsed from the filing thereof or after such shorter period as the Commission may authorize upon good cause shown.

By the Commission.

Orval L. DuBois,
Secretary.

United States of America
before the
SECURITIES AND EXCHANGE COMMISSION
March 25, 1958

In the Matter of Union Electric Company File No. 68-169 (Public Utility Holding Company Act of 1935)	Order Denying Motion for Rehearing and Permitting Amended Declaration Regarding Solicitation of Proxies to Become Effective.

The Commission having provided by order dated March 21, 1958 that the declaration filed under Section 12 (e) of the Public Utility Holding Company Act of 1935 and Rule U-62 thereunder by Union Electric Company ("Union"), a registered holding company, with respect to the solicitation of proxies in connection with the annual meeting of Union's stockholders to be held April 21, 1958, shall become effective provided certain changes are made in the management's proxy soliciting material;

Union having thereafter filed amendments to its declaration, and the Commission having examined such amendments and finding that they comply with the conditions of the Commission's order of March 21, 1958;

J. Raymond Dyer, on behalf of himself and his daughter as stockholders of Union, having on March 24, 1958 filed a brief in reply to contentions made by Union at oral argument, and requested that such brief be treated as a motion for rehearing with respect to the Commission's Findings, Opinion and Order of March 21, 1958;

The Commission having duly considered the matters set forth in said brief and being of the opinion that it and the

motion raise no issues not previously presented to or considered by the Commission in connection with its Findings, Opinion and Order of March 21, 1958, the Commission noting in particular that the brief reiterates contentions heretofore made by Dyer with respect to the vote required to amend Union's by-laws, on the basis of which the Commission had required that certain changes in Union's proxy soliciting material be made and that the changes the Commission found necessary have been made by Union's Amendments to its declaration;

It Is Ordered that the motion for rehearing presented by J. Raymond Dyer be, and it hereby is, denied.

It Is Further Ordered that the declaration of Union Electric Company, as amended, be, and it hereby is, permitted to become effective forthwith, subject to the reservation of jurisdiction recited in the Commission's order of March 21, 1958.

By the Commission.

Orval L. DuBois,
Secretary.

APPENDIX B.

1. Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS
for the Eighth Circuit.

No. 15,989

Nancy Corinne Dyer and J. Raymond Dyer, Petitioners,
Cyrus L. Day, Intervenor-Petitioner,
vs.
Securities and Exchange Commission, Respondent,
Union Electric Company, Intervenor-Respondent.

Petition to Review Orders of Securities and Exchange Commission.

[April 10, 1959.]

J. Raymond Dyer for Petitioners and Intervenor-Petitioner.

Daniel J. McCauley, Jr., Associate General Counsel, Securities and Exchange Commission (Thomas G. Meeker, General Counsel, Aaron Levy and Solomon B. Freedman, Special Counsel, and Mahlon M. Frankhauser, Attorney, on the brief) for Respondent.

Robert J. Keefe (William H. Ferrell and Keefe, Schlafly, Griesedieck & Ferrell on the brief) for Intervenor-Respondent.

Before JOHNSEN, VOGEL and MATTHES, Circuit Judges.

JOHNSEN, Circuit Judge.

This proceeding is one under 15 U.S.C.A. § 79x (a), to review two orders of the Securities and Exchange Commission, entered on March 21 and 25, 1958, allowing a declaration, filed by the management of Union Electric Company, of St. Louis, Missouri, to become effective, as a basis for the solicitation of proxies from stockholders, for the annual meeting of the corporation, to be held on April 21, 1958. Five series of amendments were made to the declaration before the Commission gave its final approval, four by management voluntarily and the fifth by requirement of the Commission as an approval condition.

We denied petitioners' request for a stay of the Commission's orders pending review, so that the stockholders meeting was held as scheduled.

Petitioners, who are daughter and father, are the holders of 350 shares of common stock in Union Electric, out of a total of 11¼ million voting shares, 10,500,000 common and 750,000 preferred. Another stockholder, the owner of 100 shares, has been permitted to join them in this proceeding as an intervenor-petitioner.

Union Electric is a holding company registered under the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U.S.C.A. § 79a et seq. It has aligned itself with the Commission's position here as an intervenor-respondent.

Difficulties and disputes had previously existed between petitioners and the management of Union Electric in relation to the annual stockholders meetings of both 1956 and 1957. In October, 1957, the Commission, on the basis of § 12 (e) of the Act, 15 U.S.C.A. § 79*l* (e), issued a notice and order, prohibiting the management of Union Electric and all other persons from soliciting proxies for the 1958 meeting, unless a declaration of the proxy material in-

tended to be used was filed with the Commission under § 12 (e) of the Act and under Rule U-62 of its implementing regulations, 17 CFR § 250.62, and unless the declaration was thereafter by order of the Commission permitted to become effective.

Petitioners meanwhile had submitted to management, under Rule X-14A-8 of the Commission's regulations, 17 CFR § 240.14a-8, eleven proposals of resolutions and amendments to by-laws, with notice of their intention to present all of these for action at the annual meeting. Management thereafter filed its declaration with the Commission, containing its proposed proxy-solicitation statement and proxy form. It included therein, for voting on at the meeting, four of petitioners' proposals, indicating that they had originated from petitioners, setting out the supporting statement of petitioners as to each, and making expression of its own opposition thereto—all as provided for by Rule X-14A-8 (b), supra.

To the declaration and the amendments thereto, as referred to above, petitioners filed a total of 35 objections. The Commission issued an order for hearing, under its Rule U-62 (c), supra, and a hearing was held. Petitioners were allowed to participate, in accordance with Rule 17 (c) of the Commission's Rules of Practice, 15 U.S.C.A. They (through the father, who is a lawyer) engaged in cross-examining witnesses, offering evidence, filing briefs, submitting proposed findings and conclusions, taking exceptions to the recommended findings and conclusions of the Division of Corporate Regulation (or Staff) of the Commission, and making oral argument. The Commission thereafter entered the orders which are here sought to be reviewed.

Numerous attacks are made by the petition for review on the Commission's proceedings, rulings, findings, conclusions and orders. These have been further compounded

and expanded, by six separate briefs which petitioners have filed, in a use to the utmost of the privilege, which we perhaps too liberally accorded them, of making full expression of their alleged grievances. The result has been that contentions have been multiplied and refined to the point of creating artificiality and almost obsessive pitch.

In petitioners' approach to and treatment of the situation on this basis, they have, we think, allowed their vision to become obscured as to the nature of what is involved and the extent of our authority in relation thereto. The Commission was here engaged in a purely administrative task. It was simply exercising regulatory judgment in respect to the propriety, adequacy, practicality, and fairness of proxy-solicitation material generally as between management and stockholders (not as to petitioners alone), and particularly in relation to the application of its own rules and regulations for promoting and affording generally (in borrowed phrase from *SEC* v. *Transamerica Corp.*, 3 Cir., 163 F.2d 511, 518) "fair opportunity for the operation of corporate suffrage".

The Commission had a right to deal with the proxy material and the 35 objections of petitioners thereto, in the light cast upon the particular situation by the filings and the evidence, on the basis of natural application of its regulations; unarbitrary administrative judgment as to matters extending beyond the reach or effectiveness of the regulations; and attribution in relation thereto of such intelligence as ordinary stockholders could be presumed to have in their receipt of proxy-solicitation material.

Petitioners have gone the length of arguing that some of the Commission's regulations should abstractly be regarded as failing to promote, or as being insufficient or ineffective to carry out, the general purpose and policy of § 12 (e) of the Act, to have proxy materials and solicitations afford a fair opportunity for the operation of cor-

porate suffrage. Here, it must be borne in mind that § 12 (e) is only generally declarative of proxy-solicitation policy, but not definitive or prescriptive in its terms, and that it entrusts to the Commission's judgment entirely the matter of what form and extent of general or specific commands or prohibitions may be necessary or appropriate to help give reality and substance to the policy. It contains express authorization of "such rules and regulations or orders as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of this chapter, or the rules, regulations or orders thereunder".

This grant of legislative or regulatory power, in its relation to proxy solicitation, requires general judicial acceptance of any properly adopted rule, regulation or general order, unless it undebatably is unrelated to, non-facilitative of, or in conflict with, the policy of the Act, or unless it otherwise is so arbitrary or burdensome as to be legally unreasonable.

It is, however, not for a court to say policy-wise, as petitioners would have us do, that it feels that some relevant rule, regulation or general order as to proxy material and solicitation does not go far enough or is not sufficiently liberal in its provisions, to enfitle it to general application. Equally, it is a matter fundamentally for the Commission's judgment whether its rules, regulations or general orders are adequate to promote the policy of the Act in application to the facts of some particular situation.

Only where the facts are such as to reach beyond the rules, regulations and general orders of the Commission, so that some clear evil or violation of the policy of the Act is in no way touched by their application, is there any basis at all for a court to say that the Commission has

not gone far enough in the particular situation. And this basis must represent, not room for difference in judgment, but lack of room legally for any sound difference as to the need to have gone further.

Similarly, as to orders not of general character but made in relation to the facts of a particular proxy-solicitation situation, with directions going beyond the rules and regulations, must a court accept the Commission's judgment, unless it can be said that what has been done is without any rational basis on all the elements involved.

Hence, as we have indicated, neither as to a regulation nor as to a special order in a proxy situation, does it matter that there may be a judicial persuasion that a different and better judgment ought to have been exercised, if the Commission's view or judgment on necessity and appropriateness constitutes a permissible one. And any consideration of the permissibility of the Commission's view, as to resting on a rational basis, must requiredly take into account the factors of the plenary scope of authority and judgment granted the Commission in the proxy field and the administrative experience or expertness which is impliedly entitled to have its play in resolving the question of need or appropriateness.

The narrow margin thus legislatively intended to exist for judicial review has been carried even into the incidence of the Commission's determinations of questions of specific fact in a situation, which are dependent entirely upon the evidence produced before it, by the provision of the Act that "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive". 15 U.S.C.A. § 79x (a).

On these bases, we turn to a more specific discussion of some of petitioners' contentions.

I.

Petitioners, as their first ground of attack, seek to have us set aside the Commission's approval of management's proxy form, because of a provision therein to the effect that, unless otherwise indicated by the stockholders, the proxy, if signed and returned, would be voted for the proposal made by management to increase the amount of authorized common stock of the corporation, as set out in the proxy material and form, and against the proposals made by petitioners, similarly set out.

It is argued that to allow such a blanket-form of proxy authority to be solicited is contrary to public policy, as not affording a sufficient opportunity for "stockholder democracy", as being conducive to "management oligarchy", and as representing "SEC czarism". Rule X-14A-4 (b) of the Commission's regulations authorizes the inclusion of such a provision in a proxy form.

The statement made by the Commission in its opinion sufficiently demonstrates the rational and relevant basis existing for the regulation and the order here made, so that we have no right to touch the situation in this respect. The Commission said: "Management's proxy is in the usual form which authorizes the holder of the proxy to vote for the election of directors, provides means whereby a stockholder may direct a vote for or against the management's proposal and each of the four proposals of Dyer which management has included pursuant to Rule X-14A-8, and states that 'This proxy will be voted as directed on the foregoing proposals, but if no such direction is specified, this proxy will be voted for the amendment to the Articles of Incorporation (management's proposal) and against Stockholder Proposals 1, 2, 3 and 4'. Dyer objects to this last statement on the ground that it deprives a stockholder of the authority to abstain from voting on one or more of the proposals. Rule X-14A-4 spe-

cifically permits the statement to which Dyer objects, and we find nothing in the circumstances of this case to require its exclusion here. It may also be noted that a stockholder wishing to abstain from having his shares voted on any matter may do so by crossing out the proviso to which Dyer objects or by other appropriate deletion or assertion".

Relatedly, the Commission further pointed out that testimony in the record by the Secretary of Union Electric showed that management had in the past received proxies with lines run through proposals therein, or with language crossed out, so that authority was left only for voting for the election of directors, and that such proxies had always been counted only for the election of directors.

Neither abstractly, nor on the facts of the immediate situation, is there any basis for us to hold that the regulation is unrelated to, non-facilitative of, or in conflict with the policy of the Act; or that it is arbitrary; or that its application here leaves wholly untouched some clear evil or violation of the Act. Petitioners have not demonstrated that application of the regulation here does not afford a fair opportunity for the operation of corporate suffrage, within the presumable intelligence of ordinary stockholders.

II.

Petitioners next contend that the Commission improperly permitted management to make solicitation of and receive proxies from broker-members of the New York Stock Exchange in a manner violative of the rules of the Exchange. Union Electric's stock is listed on the Exchange.

The stock to which petitioners' contention relates stood of record in the names of the brokers as owners, but was being held by them for beneficial owners. Under Missouri law, the brokers had a right in such situation to vote the

stock or give proxies therefor. 17 V.A.M.S. §§ 351.245; 351.250.

Under Rules 451 and 452 of the New York Stock Exchange, however, broker members of the Exchange thus holding stock are not at liberty to execute a proxy therefor without first seeking instructions from the beneficial owners. But where no instructions are received by a specified date, after request, the broker is entitled to give a proxy, except as to matters involving a "contest" or pertaining to an "authorization for a merger", or on "any matter which might substantially affect the rights or privileges of such stock". CCH New York Stock Exchange Guide, Pars. 2451 and 2452.

It is argued that it was improper for the Commission to allow management to have its proxy solicitation of such brokers and the proxy form executed by the latter include any authorization with respect to the proposal of management to increase the capital stock of the corporation, because that was a matter which petitioners were opposing and as to which in their view there accordingly existed a "contest". Corollarily, it also is contended that the Commission should have required management to make its proxy material show that petitioners opposed the stock-increase proposal.

The Commission overruled the objection and contention of petitioners, on the ground that the term "contest" was not used in the Exchange rules in the broad sense in which petitioners were seeking to have it applied but was by other language in the rules given qualification to mean only matters which were the subject of countersolicitation of proxies, or which consisted of proposals made by a stockholder which were being opposed by management.

In the enumeration of the situations in which a member organization could give a proxy without customer instructions, one of the conditions stated in the Exchange rules

was that "the person signing the proxy has no knowledge of any contest as to the action to be taken at the meeting". In another paragraph there was a statement of similar general nature that "After a contest has developed no further proxies should be given except at the direction of beneficial owners".

These expressions, standing alone, did not, of course, make the term "contest" one of limited application or special meaning. But the rules went on to add apparent qualification to the expressions, by making a specific enumeration of the situations in which "a member organization may not give a proxy to vote without instructions from beneficial owners", and in this specification the prohibition imposed, as related to the use of the term "contest", was only as to any matter which "is the subject of countersolicitation, or is part of a proposal made by a stockholder which is being opposed by management (i. e. a contest)". Similarly, in a paragraph dealing with the question of discretionary proxies which had been previously given, where a matter of "contest" should subsequently arise, the direction made was confined to "Where * * * countersolicitation develops at a later date thereby creating a 'contest' * * *." CCH N.Y. Stk. Ex. Guide, Pars. 2452.11 (2) and 2452.13.

On the qualification and import appearing to be given the term "contest" by these specifications, we can see no room for us to overthrow the Commission's conclusion and ruling. There is no evidence that the Exchange or its members have made any such application of the term "contest" as petitioners contend for, or any different interpretation of the qualifications contained in the rules than the one which the Commission reasonably did.

The comment might also pertinently be added, in relation to the policy of fair opportunity being afforded for the operation of corporate suffrage, that a use or applica-

tion of the term "contest" in the broad sense for which petitioners contend, would mean that much, if not most, of such broker-held stock could practicably be kept from exercising any voice in the affairs of the corporation, through the simple expedient of an individual dissident stockholder (of which there would perhaps always be one) giving notice to the Exchange or its individual members, in connection with every stockholder meeting, that he was going to oppose everything that management favored.

The record shows that there were approximately 4,000,000 shares of Union Electric which were broker-held, though perhaps not all by members of the New York Stock Exchange. In the confidence and authority generally allowed to exist by customers in favor of their brokers as to such stock, many of the customers would hardly bother to give instructions as to proxies merely because the broker asked them to do so. Thus it would be logical that the Exchange rules should, as they appear to do, impose only limited and not total restriction on the right of broker vote or proxy-giving, where customers failed to give instructions, and not attempt to keep the stock in such a situation from being utterly without any voice in the affairs of the corporation and in the possible affecting of the value of the stock itself, because of the mere fact that some dissident and vocal stockholder existed, who wanted to oppose everything that management did or suggested.

III.

Petitioners' next contention attacks the Commission's approval of management's exclusion of 7 of the 11 proposals made by them, from its proxy declaration. As has been indicated, management included 4 of petitioners' proposals in its proxy-solicitation material, for voting on at the meeting—one involving a by-law on proxy ballots; another relating to lobbying expenditures; a third concern-

ing limitations on advertising expenditures; and the fourth creating a stockholder relations office.

Of the 7 excluded proposals, three had been included in management's proxy declaration for the 1957 annual meeting and on submission had received less than 3% of the stockholder vote cast thereon at that meeting. The Commission sustained management's rejection of these three proposals as to its 1958 proxy declaration, on the basis of Rule X-14A-8 (c) (4) (i) of the Commission's regulations, 17 CFR § 240.14a-8 (c) (4) (i), which provides that "* * * management may omit a proposal (of a security holder) and any statement in support thereof from its proxy statement under any of the following circumstances: * * * (4) If substantially the same proposal has previously been submitted to security holders, in management's proxy statement and form of proxy relating to any annual or special meeting of security holders held within the preceding five calendar years, it may be omitted from the management's proxy material relating to any meeting of security holders held within the three calendar years after the latest such previous submission, provided that—(i) If the proposal was submitted at only one meeting during such preceding period, it received less than 3% of the total number of votes cast in regard thereto; . . .".

It is to be borne in mind that Rule X-14A-8 affords a privilege, which does not otherwise ordinarily exist in favor of stockholders. Necessarily, the Commission could properly impose reasonable conditions and limitations on the scope and manner of enjoyment of the privilege, in relation to the other elements of holding stockholder meetings and conducting corporate affairs. There clearly is no basis for us reviewingly to say that either the regulation or its application to the present situation was an improper and unwarranted act on the part of the Commission. Relatedly, it may be observed that the exclusion of petitioners' proposals from management's proxy material

did not, of course, in any way affect petitioners' independent right to make a proxy solicitation of their own or to bring up the excluded proposals from the floor of the meeting in accordance with by-law provisions.

Petitioners argue, however, that the Commission had no right to apply Rule X-14A-8 (c) (4) (i) to the three proposals rejected at the 1957 meeting, because the propriety of the Commission's order approving management's proxy material and proxy form has not yet been finally judicially determined.

A petition for review was filed by petitioners as to the Commission's proceedings, rulings, findings, conclusions and order on management's proxy-solicitation material for the 1957 meeting, just as they have done as to the 1958 meeting. We, as here, denied a request for a stay of the Commission's order as to that meeting, and the 1957 meeting was held as scheduled.

On subsequent hearing of petitioners' review proceeding, the division of the Court to which the matter was assigned dismissed the petition as having become moot by reason of the fact that the meeting to which the proxy-solicitation controversy related had then been held. *Dyer v. Securities and Exchange Commission*, 8 Cir., 251 F.2d 512. Petitioners filed a petition for a writ of certiorari to this dismissal of the review proceeding for mootness, and that petition is now pending in the Supreme Court. (The question whether the holding of the 1958 meeting should similarly be regarded as having rendered the present petition for review moot was permitted by us to be reopened and argued and is dealt with, post, in subdivision X of this opinion.)

Regardless of the fact that the pendency of the petition for certiorari has left the question of the propriety of the Commission's 1957 order not finally judicially resolved, we think that the Commission was legally warranted in

treating the order as valid and having effect, and as thus affording a proper basis, under Rule X-14-A-8 (c) (4)-(i), for excluding from the 1958 proxy declaration the three proposals acted on and rejected at the 1957 meeting. This is because of the provision of 15 U.S.C.A. § 79x (b), which allows Commission orders to have legal operation, despite the pendency of proceedings for review, unless a stay of their operation is "specifically ordered". Regardless of what might be the ultimate judicial result as to the 1957 review proceeding, the Commission's treatment of the situation here was valid and proper administrative action in relation to the consideration required of it as to the immediate controversy.

IV.

Of the four other excluded proposals of petitioners, the contents of two were identical, the only difference between them being that one was drawn in the form of a general resolution and the other in the form of an amendment to the by-laws. Both provided that "false or deceptive advertising by the company, and false or deceptive communications by the company to its stockholders, be outlawed, and that the officers and directors of the company be divested of all authority to expend corporate funds for either of these purposes".

It was the Commission's view that management was warranted in not submitting these proposals in its proxy materials, because of the provision of Rule X-14A-8 (c) (5) of the Commission's regulations that a proposal by a security holder may be omitted by management from its proxy statement and proxy form, "(5) If the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer".

The Commission's Staff, similarly as management, in its recommendation of findings and conclusions to the Com-

mission, regarded the proposals as not adding anything to what management was already bound to do as a matter of business ethics and of prohibition under the false-advertising statute of Missouri. The Commission, as indicated in its order, felt additionally, on the basis of the reasons contained in a written opinion by Union Electric's general counsel to the corporation, copy of which was made a part of the record, that, as a matter of fact, the officers and directors did not now have any legal authority, between themselves and the company, to expend corporate funds for such form of advertising and communications as the proposals were directed against, so that there was nothing to "outlaw" or to divest "authority" in respect to. Thus, the Commission apparently felt that the proposals would legally have no effect, and all that they actually could serve to do would be to convey the implication to stockholders that such authority presently existed and was being exercised.

The statement which petitioners submitted to management in support of the proposals asserted that Union Electric had been guilty of expending money for false advertising and false communications, particularly in 1956. The advertisements and communications which petitioners had in mind consisted of statements on the part of management, defending its conduct in relation to a lobbying fee paid by the corporation in trying to get a certain bill through the Illinois Legislature—a matter which had notoriously been the subject of considerable publicity, investigation and public reaction. The Commission did not pass upon the merits of petitioners' charges, because it regarded the materials which petitioners attempted to offer in evidence on the question of alleged falsity as being too remote in nature.

We think there would be room to differ with the Commission's judgment in respect to the propriety and desirability of permissibly allowing these two proposals to be

submitted as a matter of stockholder reaction, expression and direction on policy, in view of the cloud created by the lobbying-fee incidents and the differing public discussion apparently stirred up by the explanation made of them. We are not prepared to say, however, that the Commission's views and rulings are devoid of rational basis, so as to entitle us to set aside its order in this respect. Any disagreement with the Commission's order would, we think, represent in the situation simply a difference in possible persuasion and judgment as to the relative weight of the varying elements and considerations capable of being involved. Since the particular question is one wholly of administrative and not quasi-judicial approach and perspective, we would not, within the principles stated at the start of this opinion, be warranted in usurpingly substituting our judgment for that of the Commission, by engaging in a choice, on weight, against those relevant factors which the Commission thought sufficiently justified an exclusion of the proposals.

V.

The other two excluded proposals of petitioners were attempts to amend the by-laws to accord certain rights as to the stock held by minors in their own name.

One of the proposals was "that the By-Laws be amended so as to provide that the company accord to the father and/or mother, or guardian, of a minor stockholder (whichever is legally entitled thereto) all rights incident to stock ownership that it accords stockholders who have reached their majority". The other proposal was one to allow minors to give proxies for the stock standing in their name.

The Commission held that management was entitled to exclude these two proposals as not being in harmony with Missouri law.

In *State ex rel. Dyer* v. *Union Electric Company*, Mo. App., 309 S.W.2d 649, to which petitioners were parties, the St. Louis Court of Appeals specifically held that under the law of Missouri a minor (in that case a Union Electric stockholder) was without legal capacity to appoint an agent. The Missouri Supreme Court denied petitioners' request for a transfer of the case to it in review. There is accordingly no need to waste time on petitioners' argument that we ought to ignore this decision, make a different declaration, and set aside the Commission's holding.

Similarly, in respect to the proposal to have the by-laws accord rights to a father or mother or guardian of a minor stockholder, 26 V.A.M.S. § 475.025 allows a father or mother as natural guardian of a minor to exercise the powers of a court-appointed guardian over such property only of the minor as "is derived" from them. It does not accord them such power generally, as the proposal of petitioners sought to have the by-laws recognize in their favor. Again, on the powers of a court-appointed guardian as to corporate stock, the statutes of Missouri provide that "no guardian * * * shall be entitled * * * to vote shares * * * without a transfer of such shares into his name". 23 V.A.M.S. § 351.260 (2).

Thus, the attack here upon the Commission's views and holding as to these two proposals manifestly is artificial and frivolous.

VI.

Petitioners make a number of contentions in relation to management's proposal, as set out in its proxy material, to increase the authorized common stock of the corporation from 10,500,000 to 12,000,000 shares.

They argue that the Commission should have required financial statements to be included in the proxy material as to the stock increase. The Commission pointed out

that, while its rules provide that financial statements must be included in proxy statements under certain circumstances, Item 15 (c) of Schedule 14A, covering "Information Required in Proxy Statement", 17 CFR § 240.14A, Item 15 (c), specifically provides that "Such financial statements * * * are not deemed material in cases involving the authorization or issuance of common stock, otherwise than in exchange". The Commission added that there was "nothing unusual in connection with the company's proposal to increase its authorized stock" which called for the situation to be taken out of the application of the regulation. Here again, with no demonstration of need and only expression of petitioners' own philosophy, the contention must be regarded as artificial and captious.

Another contention made is that management was improperly permitted to state in its proxy material that a majority vote was necessary to make amendment of the articles of incorporation to provide for the proposed stock increase. Petitioners assert that a two-thirds plurality was required. As the Commission pointed out, the articles of incorporation contained a provision that certain sections thereof should be subject to amendment only by a two-thirds affirmative vote, but the section as to the amount of authorized common stock was not one of these. In the absence of a provision otherwise, the corporation laws of Missouri leave a charter provision as to the amount of common stock subject to amendment by majority vote. 23 V.A.M.S. § 351.090 (3). Union Electric's by-laws also provide that such an amendment may be made by majority vote.

Petitioners further complain because they were denied the privilege of making a statement in management's declaration in opposition to the proposed stock increase. The Commission adequately answered this objection and contention by its statement that "The Commission's proxy rules contain no provision requiring management to in-

clude such opposition statements by stockholders in its own proxy material and no special circumstances have been shown to justify making an exception in this case".

VII.

Another grievance of petitioners is that the statement made by management in its proxy material against two of their four proposals which management had included was in excess of 100 words and that the Commission refused to require the statements to be reduced to that length. Rule X-14A-8 (b) of the Commission's regulations requires that, where management includes in its proxy material, for vote at a meeting, a proposal by a security holder to which it is opposed, it must also include "a statement of the security holder in not more than 100 words in support of the proposal". The regulations, however, impose no similar limitation upon the number of words which management may insert in its own proxy material in opposition.

The Commission said: "The 100-word limitation is a reasonable qualification of the right which the Regulation gives a stockholder to have included in the management's proxy material, at the expense of the corporation, a statement in support of his own proposal. The same considerations do not apply to statements made by management in its own material".

Whatever substance might be capable of existing a stockholder's complaint against a refusal of the Commission to depart from the regulation and to afford him more than 100 words in some extreme or complicated situation, he could hardly have a legitimate grievance where his 100-word allowance had afforded him all the opportunity that he had demonstrated that he needed for statement. Here, petitioners' argument amounts to nothing more than that, as an abstract difference in number of

words, the Commission was required to limit the statement of management to the same length as that of petitioners. This is hardly substance on which to ask judicial review.

VIII.

Petitioners contend that the Commission improperly approved amendment 5 made by management to its proxy material, pursuant to the requirement of the Commission's conditional order of March 21, 1958, thereby allowing management's proxy declaration and proxy form to become effective, without giving them an opportunity for further objection and hearing. They allege that the requirement of due process was thereby violated.

The conditional order of the Commission of March 21, 1958, imposed two requirements upon management as a basis for allowing its proxy statement and proxy form to become effective.

Management's declaration, as filed with the Commission, had stated, on the basis of the provisions of its by-laws, that a vote of a majority of the outstanding shares was necessary to make amendment of the articles of incorporation to increase the amount of the common stock. Petitioners argued that under the Missouri statute a majority of the shares voted, if a quorum was present, was sufficient, unless the articles of incorporation contained a different provision, which they here did not, if the Commission was correct in its ruling, as discussed in subdivision VI hereof, supra. The by-law provision, on which management relied as against the statute, had been adopted prior to the enactment of the statute. To rid itself of this collateral legal dispute, the Commission made its conditional order of approval provide as follows: "Under the circumstances we are of the opinion that if the management statement retains the present statement regarding

the vote required, it should indicate that Dyer has raised the question regarding the vote required for amendment, but that in the opinion of the company counsel the by-law provision is valid under Missouri law".

The Commission further directed that as to petitioners' proposal No. 2, on lobbying expenditures, included by management in its proxy declaration for voting on at the meeting, the statement of management that substantially the same proposal had received less than 27% of the "requisite" vote at the 1957 meeting should similarly be appropriately revised in relation to the difference in views between Dyer and company counsel on what vote was necessary to effect amendments.

Management thereafter made amendments to its declaration, which the Commission approved as satisfying the requirements imposed by it, and on the basis of which it entered its order of March 25, 1958, allowing the proxy statement and proxy form of management to become effective for solicitation purposes. But the amendments did not satisfy petitioners. They wanted to file more objections, and because the effectuating order was entered without waiting to receive any further objections from them, they contend that the order is without due process and so is invalid.

The Commission had the right to determine whether the amendments satisfied the requirements imposed by it as a condition for allowing the declaration to become effective, without waiting to see whether they satisfied petitioners—and particularly since it had indicated what the substance of the amendment was to be, so that the only question could be the matter of form.

It required no granting of opportunity for petitioners to be heard from on whether the Commission ought to be satisfied as to the form of expression made on these wholly

collateral matters in their relation to a stockholder's giving of proxy. With the full opportunity which had been accorded for hearing on the merits of the things involved in and affected by the proxy solicitation, there could exist no question of due process as to the administratively concluding order made in relation to the form of the expression allowed on this collateral aspect. Beyond this, the argument which petitioners here make against the expression allowed is, we think, purely captious and hypercritical and utterly without any substance. It impresses as amounting simply to a desire not to pass up any opportunity to engage in more objections.

IX.

We are still a long way from the end of the trail of petitioners' objections and contentions. This opinion could be carried to several times its present length, in similar vein and with corresponding result to the discussion which has preceded. The extent and nature of the things argued, which progressively reach into even still thinner soil, neither merit nor warrant us in so prolonging our opinion. It has already been allowed to go beyond the point of any useful purpose that can legally be served, in a matter which increasingly impresses that it is more permeated with the fertility of crusade than the objectivity of advocacy. We have, however, responsibly engaged in the laborious task of ferreting out, in the jungle of expression before us, all of petitioners' scattered contentions and considering them, so as to be certain that there is nothing that entitles the Commission's orders to be set aside. Within the scope and function of our review authority as to the character of the proceeding involved, there is nothing which the Commission has done or failed to do that entitles petitioners in any respect to have the Commission's orders reversed.

X.

The only thing therefore of which we shall remainingly make discussion is the question of mootness, as referred to above.

As has been noted, the division of the Court, before which was heard petitioners' proceeding to review the order made by the Commission on the proxy solicitation for the 1957 annual meeting, dismissed that proceeding as having become moot by virtue of the meeting having by that time been held. *Dyer* v. *Securities and Exchange Commission*, 8 Cir., 251 F.2d 512. That case is now pending in the Supreme Court on petition for a writ of certiorari, so that it would not be proper for us to make any expression in relation to it. What we say here is therefore intended to have application simply to the situation before us. We shall accordingly not engage in any direct examination of what the questions were which were sought to be presented for review in the previous case, as a matter of either similarity or distinction.

Doubtless, there can be questions of such a nature or incidence in a relation to a proxy solicitation that their administrative significance can become moot from a holding of the stockholders meeting. But we are satisfied that questions too can exist, as in the present situation, which are of such a character or consequence that they cannot properly be regarded as having become fixed or dissolved or otherwise rendered inoperative by the holding of the meeting.

Thus, in example here, where proposals made by petitioners had been permitted to be included in the proxy-solicitation material, and where a defeat of them at the meeting could, under the regulations of the Commission, as above referred to, impose a limitation upon the right of petitioners and other stockholders to have them again so

submitted, the question whether the Commission had allowed the proxies used against them to be solicited on an improper basis would be one of continuing effect.

Beyond this, it is apparent, from the three-year history which has up to this point preceded, that the fight of petitioners against the management of Union Electric is one that is going to have an unremitting and indefinite duration. In this situation, not merely from the standpoint of petitioners, but as well from the standpoint of the Commission, the corporation, and the other stockholders, it is desirable to get the questions here involved leveled off, so that the controversy can begin to have some settling in its course.

Relatedly, and as a matter of preventing legal frustration, it is evident that, unless the situation is so dealt with, it will be impossible practicably for any affected party (whether petitioners, management, or the other stockholders) ever to obtain on a proxy-solicitation question the judicial review provided for by the statute, so as to be able to get such a situation acceptedly settled or legally stabilized. Experience in the two situations which have now been before us shows that it is physically impossible, in a proxy-solicitation controversy of such character and length as these two have been, to get the proceedings for review perfected and subject to hearing and disposition, between the time of the action of the Commission and the date of the corporation's annual meeting, unless a stay is granted, for which there is no occasion in the ordinary situation.

In still wider horizon, there also is a recognized right of judicial discretion, in the public interest, to deal with the validity or propriety of administrative regulations and actions, where they have justiciably been brought into court, even though they may perhaps have ceased thereafter to have a direct significance in the particular situa-

tion. This does not mean that a court is required or has the right to engage in a decision of this character in every such situation; but it is judicially entitled to do so where it appears that some general benefit may public-wise, or in relation to the possibility of further similar litigation, come from having it established whether the administrative agency has acted within or without its authority. One of the things, among others, that could tend to prompt such a consideration here is petitioners' repeated charge that the members of the Commission are holding-company-minded and have been biased and prejudiced against petitioners—a charge for which we find not the slightest basis in the record, and the cloud of which the Commission is entitled to have here lifted.

Ample authority for the views expressed above exists in such cases as *Okin* v. *SEC*, 2 Cir., 145 F.2d 913, 914; *South Carolina Public Service Authority* v. *SEC*, 4 Cir., 170 F.2d 948, 951-952; *SEC* v. *Transamerica Corp.*, 3 Cir., 163 F.2d 511; *Walling* v. *Mutual Wholesale Food and Supply Co.*, 8 Cir., 141 F.2d 331, 334-335; *Boise City Irrigation & Land Co.* v. *Clark*, 9 Cir., 131 F. 415, 419; *Gay Union Corp.* v. *Wallace*, D.C. Cir., 112 F.2d 192, 195; *Walling v. Reiter, Inc.*, 321 U.S. 671, 674-675, 64 S.Ct. 826, 828, 88 L.Ed. 1001; *Southern Pacific Terminal Company* v. *ICC*, 218 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310. See also "Federal Jurisdiction to Decide Moot Cases", 94 Pa. L. R. 125; "Administrative Law—Questions 'Moot' on Appeal", 22 Ind. L. J. 235; "Public Interest as Ground for Refusal to Dismiss on Appeal where Question has Become Moot", 132 A. L. R. 1185, Annotation.

On all the considerations indicated, we think that the present situation is entitled to be disposed of on its merits, and we have so dealt with it. It may be added that both the Commission and Union Electric also have urged that the situation involved should not be treated as having become moot.

XI.

On the merits of all the questions and contentions raised by petitioners, including those generally referred to as well as those specifically discussed, the orders of the Commission are entitled to be and are hereby affirmed.

2. Judgment Below.

UNITED STATES COURT OF APPEALS
for the Eighth Circuit.

No. 15989. September Term, 1958.

Nancy Corinne Dyer and J. Raymond Dyer, Petitioners, Cyrus L. Day, Intervenor-Petitioner, vs. Securities and Exchange Commission, Respondent, and Union Electric Company, Intervenor-Respondent.	Petition to Review Orders of Securities and Exchange Commission.

This cause came on to be heard on the Petition of Petitioners to review Orders of the Securities and Exchange Commission dated March 21st and March 25th, 1958, allowing a declaration filed by the management of the Union Electric Company, of St. Louis, Missouri, to become effective, as a basis for the solicitation of proxies from Stockholders, for the annual meeting of the corporation, to be held on April 21, 1958; on the transcript of record and sup-

plemental transcript of record; the briefs filed by the respective parties, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the said Orders of the Securities and Exchange Commission be, and they are hereby, affirmed.

And it is further Ordered by this Court that the Petition to review in this matter be, and it is hereby, dismissed.

April 10, 1959.

[redacted]

DRAFT FOR THE SECURITIES
AND EXCHANGE COMMISSION
BY
CAPSTEAD

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 269

NANCY CORINNE DYER and J. RAYMOND DYER, PETITIONERS,

CYRUS L. DAY, INTERVENOR-PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION AND UNION ELECTRIC COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. B, 61-86) is reported at 266 F. 2d 33. The Findings and Opinion and Orders of the Securities and Exchange Commission (Pet. App. A, 41-60) have been published as Holding Company Act Release Nos. 13710 and 13712.

JURISDICTION

The judgment of the Court of Appeals was entered on April 10, 1959, (Pet. App. B, 86-87). Petitioners' timely petition for rehearing was denied on May 11, 1959. The petition for a writ of certiorari was filed on August 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there is merit to petitioners' charges that four of the five members of the Securities and Exchange Commission were disqualified from considering the matter "on the grounds of bias, prejudice and favoritism", where the court below determined that there was "not the slightest basis in the record" for these charges.

2. Whether the Commission has jurisdiction to act with respect to a declaration concerning proxy solicitation filed by a public utility holding company when an order of the Commission concerning the same company's proxy solicitation for a previous year, involving the same issues, was pending on review.

3. Whether (a) the orders of the Commission properly permitted the exclusion of certain proposals and statements of petitioners from the company's proxy statement and whether (b) the form of proxy and the form of instructions to brokers as record owners of the company's voting shares complied with the rules of the Commission and of the New York Stock Exchange.

STATUTE INVOLVED

Relevant provisions of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U.S.C., Sec. 79a, and the Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. 78a, and the applicable rules and regulations, are set forth in the Appendix, *infra*, pp. 11-17.

STATEMENT

Petitioners, record holders of 350 shares of the common stock of Union Electric Company ("Union"), a holding company registered under the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U.S.C. 79(a), *et seq.* ("the Act"), seek review of the judgment of the court below affirming two orders of the Securities and Exchange Commission, dated March 21, 1958 and March 25, 1958 (Pet. App. A, 57-60). The Commission's orders granted Union authorization to solicit proxies in connection with its annual meeting of stockholders on April 21, 1958.

The Commission's jurisdiction over proxy solicitations with respect to a registered holding company is derived from Section 12(e) of the Act. Section 12(e) makes it unlawful for any person to solicit proxies in respect of any security of a registered holding company or subsidiary company thereof in contravention of "such rules and regulations or orders as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers . . ." Pursuant to Section 12(e), the Commission issued a notice and order

on October 25, 1957, prohibiting Union and all other persons from soliciting proxies for the 1958 annual meeting of Union's stockholders unless a declaration with respect to the solicitation material was first filed with the Commission and was permitted to become effective. In compliance with this order, Union filed a declaration which included, *inter alia*, its proposed proxy statement and form of proxy or ballot. The solicitation, as authorized by the Commission, was for the purpose of electing directors and to obtain a vote of stockholders on a proposal by Union and on four proposals of petitioners. Seven other proposals submitted by petitioners for inclusion in Union's proxy statement and form of proxy were omitted on the ground that they did not comply with the applicable standards of the Act and the Commission's rules. The Commission also found that petitioners' numerous other objections were without merit.

ARGUMENT

In an extensive opinion, the Court of Appeals has reviewed the orders of the Commission and held that the Commission had jurisdiction with respect to Union's 1958 declaration; that the orders of the Commission and the rules upon which they were based were valid; and that ". . . there is nothing which the Commission has done or failed to do that entitled petitioners in any respect to have the Commission's orders reversed." 266 F. 2d 33, 46 (Pet. App. B, 82). Petitioners have had full and adequate review in the Court of Appeals. They present

nothing calling for further scrutiny by this Court.

1. Petitioners contend that four of the Commissioners of the Securities and Exchange Commission who heard and decided this case should have disqualified themselves or been disqualified "on the grounds of bias, prejudice and favoritism" (Pet. 10-11, 31). The allegations, which were based solely upon petitioner J. Raymond Dyer's own affidavit, were considered and reviewed by the court below which found that there was ". . . not the slightest basis in the record" to support "petitioners' repeated charge that the members of the Commission are holding-company-minded and have been biased and prejudiced against petitioners . . ., the cloud of which the Commission is entitled to have here lifted.". 266 F. 2d 33, 47 (Pet. App. B, 85). There is no occasion for a further canvassing of these wholly unsupported assertions.[1]

2. Petitioners also contend that since certain issues in the 1958 administrative proceeding (involved here) were at the time also involved in the then pending court proceeding relating to the 1957 solicitation,[2] the Commission did not have jurisdiction in

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[1] Petitioners erroneously imply that, by authorizing the proposed solicitation under the proxy regulation, the Commission "approves" the candidates with whom petitioners are dissatisfied. In addition, this was not even an issue before the Commission or the court below.

[2] On January 21, 1958, the Court of Appeals for the Eighth Circuit dismissed the petition for review in the 1957 case on the ground of mo[illegible]ss, and on February 12, 1958, denied rehearing, 251 F. 2d 512. At the time the 1958 administrative proceeding was pending before the Commis-

1958 to "assume" that its proxy regulations were valid and to give effect to its rulings in the prior administrative proceeding (Pet. 32-33). The short and definitive answer was given by the court below (266 F. 2d at 42; Pet. App. B, 73-74):

> "Regardless of the fact that the pendency of the petition for certiorari has left the question of the propriety of the Commission's 1957 order not finally judicially resolved, we think that the Commission was legally warranted in treating the order as valid and having effect, and as thus affording a proper basis, under Rule X-14-A-8(c)(4)(i), for excluding from the 1958 proxy declaration the three proposals acted on and rejected at the 1957 meeting. This is because of the provision of 15 U.S.C.A., Sec. 79x(b), which allows Commission orders to have legal operation, despite the pendency of proceedings for review, unless a stay of their operation is 'specifically ordered'. Regardless of what might be the ultimate judicial result as to the 1957 review proceeding, the Commission's treatment of the situation here was valid and proper administrative action in relation to the consideration required of it as to the immediate controversy."

3. (*a*). Some of the petitioners' other contentions arise from a misconception of the Commission's proxy regulations or out of a refusal to abide by

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sion, the time for filing the petition for certiorari with respect to the 1957 proceeding had not expired. Subsequently, in *Dyer* v. *Securities and Exchange Commission*, 359 U.S. 199, the Court granted the petition for certiorari filed May 20, 1958, vacated the judgment of the Court of Appeals and remanded for further consideration in light of the present decision of the court below.

the limitations prescribed in those regulations. Thus, under Rule 14A-8, a stockholder may submit to management a proposal for inclusion in its proxy statement and form of proxy for a vote of stockholders, accompanied by an explanatory statement not exceeding 100 words if the management is opposed to the proposal. This Rule, as the court below noted, "affords a privilege, which does not otherwise ordinarily exist in favor of stockholders" (266 F. 2d at 41; Pet. App. B, 72) and, like other provisions of the proxy regulations, was designed to give practical recognition to "the intent of Congress to require fair opportunity for the operation of corporate suffrage".[3] The privilege, however, is not unqualified, and a stockholder who seeks the benefits of Rule 14A-8 must meet its requirements and is subject to its limitation.

In 1957 and 1958, the management of Union included in its proxy statement and form of proxy a total of 11 of petitioners' proposals, all of which the stockholders rejected; other proposals were excluded under specific provisions of the proxy rules. Petitioners complain here of the exclusion of their two proposals barring false advertising and false communications to stockholders by Union's management (Pet. 8). The Commission concluded that the proposals were subject to exclusion under Paragraph (c)(5) of Rule 14A-8 which provides that management may omit any stockholder proposal consisting of "a recommendation or request that man-

[3] *S.E.C.* v. *Transamerica Corp.*, 163 F.2d 511, 518 (C.A. 3), certiorari denied, 332 U.S. 847.

agement take action with respect to a matter relating to the conduct of the ordinary business" of the company. The Commission emphasized that it in no way sanctioned false advertising or false communications to stockholders, but held that the proposals would be ineffectual, providing nothing to which the management was not already bound by business ethics or law (Pet. App. A, 52). The court below stated that, while there was room to differ with the Commission's judgment as to the propriety of excluding the two proposals, "We are not prepared to say, however, that the Commission's views and rulings are devoid of rational basis, so as to entitle us to set aside its order in this respect" (266 F. 2d 33 at 43; Pet. App. B, 76). Petitioners present no real argument as to why the Commission's ruling should be deemed arbitrary or capricious, but only their reiterated conviction that their own position is the correct one.[4]

(*b*). Petitioners complain about Union's form of proxy, which stated in bold-face type that a stockholder could signify his support of management's position on the proposals by signing the form of proxy without specifically marking the ballot on each proposal (Pet. 26-28). Petitioners concede that this form of proxy is specifically permitted by Rule 14A-4(b), but argue that this Rule is invalid. In

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[4] Petitioners also contend that their statement in opposition to management's proposal was erroneously excluded from management's proxy material. The proxy regulations do not require the inclusion of such a statement in *management's* proxy material.

effect, petitioners contend that, under Section 12(e) of the Act which confers upon the Commission broad authority to promulgate proxy regulations "in the public interest or for the protection of investors", the Commission cannot permit the form of ballot authorized by Rule 14A-4(b), but must prescribe the form of ballot which petitioners favor. The court below properly found no basis for disturbing the Commission's regulatory judgment in this area (266 F. 2d at 39; Pet. App. B, 68).

Finally, petitioners urge that Union's letter of instruction to member firms of the New York Stock Exchange concerning the voting of shares held for beneficial owners was improper under the rules of the Exchange (Pet. 23-25). The Commission rejected petitioners' contention that there was "a contest" under the New York Stock Exchange Rules,[*] and held that, if no specific instructions were received from the beneficial owners, the brokers, as record owners, might execute the proxy under those Rules. Accordingly, the Commission found that the voting instructions complied with the applicable

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[*] The particular provisions here involved are Rules 451 and 452, published in CCH New York Stock Exchange Guide, paragraphs 2451 and 2452. These rules provide, *inter alia*, that member firms who are record holders of the stock may not execute a proxy therefor without first seeking instructions from the beneficial owners. If no instructions are received by a specific date, the broker, as record holder, may vote the shares by proxy without instruction, except with respect to matters involving stockholder proposals which management opposes or management proposals which are the subject of a counter-solicitation (*i.e.*, a "contest").

rules of the New York Stock Exchange. The Court of Appeals discussed this question in detail and sustained the Commission's view. The Stock Exchange rules are quite clear on this question, and we rest on the analysis of the court below (266 F. 2d at pp. 39-41; Pet. B, 68-71).

CONCLUSION

The decision below is correct and is not in conflict with any decision in any other circuit. The petitioners present no issue of importance in the administration of the statute or the proxy rules. The petition for a writ of certiorari, accordingly, should be denied.

Respectfully submitted,

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SEPTEMBER 1959

APPENDIX

APPLICABLE STATUTORY PROVISIONS AND RULES

1. The relevant section of the Public Utility Holding Company Act of 1935, 49 Stat. 803, is Section 12 (e):

> It shall be unlawful for any person to solicit or to permit the use of his or its name to solicit, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, any proxy, power of attorney, consent, or authorization regarding any security of a registered holding company or a subsidiary company thereof in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

2. The Commission has promulgated certain Rules under this Section of the Act. The applicable Rule is:

> Rule 62. (a). *General Provisions.*—No solicitation of any authorization, regarding any security of a registered holding company or a subsidiary company thereof, in connection with any reorganization subject to the approval of the Commission or in connection with any other transaction which is or will be the subject of an application or declaration filed with the Commission, shall be made except pursuant to a declaration with respect to such solicitation which has become effective in the manner prescribed in paragraph (d) of this rule.

* * * *

Rule 62 (c). *Contents of declaration.*—Every declaration pursuant to this rule shall, if in connection with any reorganization, be filed on form U. R-1. Every other declaration subject to this rule may be filed in connection with the application or declaration with respect to the proposed transaction, and shall contain, in addition to the information otherwise specified in such application or declaration, copies of any letters of solicitation proposed to be used, copies of all other documents proposed to be transmitted with such letter of solicitation, and a full statement of the manner in which the solicitation is proposed to be made.

* * * * *

Rule 62 (e). *Order for hearing.*—If the Commission shall issue an order for hearing on a declaration under this rule, such declaration shall become effective only pursuant to the further order of the Commission and subject to such terms and conditions as the Commission may prescribe.

* * * * *

3. The relevant section of the Securities Exchange Act of 1934, 48 Stat. 881, is Section 14 (a):

Sec. 14 (a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the Commission may

prescribe as necessary or appropriate in the public interest or for the protection of investors.

4. Applicable Rules promulgated pursuant to the Exchange Act:

Rule 14A-1. * * * *Solicitation.*—The terms "solicit" and "solicitation" include—

(1) any request for a proxy whether or not accompanied by or included in a form of proxy;

(2) any request to execute or not to execute, or to revoke, a proxy; or

(3) the furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.

* * * *

Rule 14A-2 *Solicitation to Which Rules Apply.*—The rules contained in this regulation apply to every solicitation of a proxy with respect to securities listed and registered on a national securities exchange, whether or not trading in such securities has been suspended, except the following:

* * * *

Rule 14A-2 (f). Any solicitation which is subject to Rule 62 under the Public Utility Holding Company Act of 1935.

* * * *

Rule 14A-4. *Requirement as to Proxy.*—(a) The form of proxy (1) shall indicate in boldface type whether or not the proxy is solicited on behalf of the management, (2) shall provide a specifically designated blank space for dating the proxy and (3) shall identify clearly and impartially each matter or group of related matters

intended to be acted upon, whether proposed by the management or by security holders. No reference need be made, however, to proposals as to which discretionary authority is conferred pursuant to paragraph (c).

(b) Means shall be provided in the form of proxy whereby the person solicited is afforded an opportunity to specify by ballot a choice between approval or disapproval of each matter or group of related matters referred to therein as intended to be acted upon, other than elections to office. A proxy may confer discretionary authority with respect to matters as to which a choice is not so specified provided the form of proxy states in bold face type how it is intended to vote the shares represented by the proxy in each such case.

(c) A proxy may confer discretionary authority with respect to other matters which may come before the meeting, provided the persons on whose behalf the solicitation is made are not aware a reasonable time prior to the time the solicitation is made that any such other matters are to be presented for action at the meeting and provided further that a specific statement to that effect is made in the proxy statement or in the form of proxy. A proxy may also confer discretionary authority with respect to any proposal omitted from the proxy statement and form of proxy pursuant to paragraph (c) of § 240.14a-8.

* * * * *

(e) The proxy statement or form of proxy shall provide, subject to reasonable specified conditions, that the shares represented by the proxy will be voted and that where the persons so-

licited specifies by means of a ballot provided pursuant to paragraph (b) a choice with respect to any matter to be acted upon, the shares will be voted in accordance with the specifications so made.

* * * *

Rule 14A-8. *Proposals of Security Holders.*—(a) If any security holder entitled to vote at a meeting of security holders of the issuer shall submit to the management of the issuer a reasonable time before the solicitation is made a proposal which is accompanied by notice of his intention to present the proposal for action at the meeting, the management shall set forth the proposal in its proxy statement and shall identify the proposal in its form of proxy and provide means by which security holders can make the specification provided for by § 240.14a-4 (b). A proposal so submitted with respect to an annual meeting more than 60 days in advance of a day corresponding to the first date on which management proxy soliciting material was released to security holders in connection with the last annual meeting of security holders shall prima facie be deemed to have been submitted a reasonable time before the solicitation. This section shall not apply, however, to elections to office.

(b) If the management opposes the proposal, it shall also, at the request of the security holder, include in its proxy statement the name and address of the security holder and a statement of the security holder in not more than 100 words in support of the proposal. The statement and request of the security holder shall be furnished to the management at the same time

that the proposal is furnished. Neither the management nor the issuer shall be responsible for such statement.

(c) Notwithstanding the foregoing, the management may omit a proposal and any statement in support thereof from its proxy statement and form of proxy under any of the following circumstances:

(1) If the proposal as submitted is, under the laws of the issuer's domicile, not a proper subject for action by security holders; or

* * * *

(4) If substantially the same proposal has previously been submitted to security holders, in the management's proxy statement and form of proxy relating to any annual or special meeting of security holders held within the preceding five calendar years, it may be omitted from the management's proxy material relating to any meeting of security holders held within the three calendar years after the latest such previous submission, provided that—

(i) If the proposal was submitted at only one meeting during such preceding period, it received less than 3% of the total number of votes cast in regard thereto; or

(ii) if the proposal was submitted at only two meetings during such preceding period it received at the time of its second submission less than 6% of the total number of votes cast in regard thereto; or

* * * *

(5) If the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the

conduct of the ordinary business operations of the issuer.

Rule 14A-11. Special Provisions Applicable to Election Contests.

(a) Solicitations to which this rule applies.

This rule applies to any solicitation subject to this regulation by any person or group of persons for the purpose of opposing a solicitation subject to this regulation by any other person or group of persons with respect to the election or removal of directors at any annual or special meeting of security holders.

U. S. GOVERNMENT PRINTING OFFICE 1954

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IN THE MATTER OF AND PETITION OF [illegible]-INVESTORS

REPLY TO BRIEF OF SECURITIES AND EXCHANGE COMMISSION

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 269.

NANCY CORINNE DYER and J. RAYMOND DYER,
Petitioners,

CYRUS L. DAY,
Intervener-Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION and
UNION ELECTRIC COMPANY.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONERS' AND INTERVENER-PETITIONER'S REPLY TO BRIEF OF SECURITIES AND EXCHANGE COMMISSION.

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3 Barron & Holtzoff, Federal Practice and Procedure, Sec. 1255

Cases in Equity That Become Moot on Appeal, 34 H. L. R. 416

Facts and Fictions of U. S. Capitalism, The Reporter, Sept. 17, 1959, p. 43

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SUMMARY OF ARGUMENT.

In its brief herein the Securities and Exchange Commission ("SEC") lists three main questions as being presented. They are, 1) the disqualification of Commissioners

Orrick, Patterson, Hastings and Sargent, 2) the SEC's jurisdiction to hold its 1957 order valid, that order being on review, 3a) the legality of its exclusion from management's proxy material of certain of petitioners' proposals and petitioners' objection to management's proposal, and 3b) the legality of its approval of management's proxy form and management's solicitation of members of the New York Stock Exchange under the Rules of that Exchange. The lower court affirmed the SEC's findings in each of those respects. This brief is in reply to the SEC's argument in support of each of those affirmations.

This brief also, in section 4) hereof, refutes the SEC's contention that the disqualification of J. Wesley McAfee, president of Union Electric Co. ("Union"), is not an issue herein, which finding of the SEC the lower court affirmed. In section 5) this brief points out the social effect of that affirmation and, with citation of authority, urges that if the writ prayed be granted printing of the record be dispensed with.

This brief also urges that the management of public utility holding companies should be kept in honest hands, and that, when that honesty is challenged by stockholders it is the duty of the SEC to determine the facts and either disqualify the challenged candidates for re-election or not. The SEC abdicated that duty here, contending it was not the "proper forum", which abdication the lower court affirmed. In effect, it held that the SEC could flash the green light, but not the red. That places the government in the position of contributing to the perpetuation in power of dishonest public utility holding company directors, contrary to the Public Utility Holding Company Act.

ARGUMENT

I.

In its brief, p. 5, the SEC contends that "there is no occasion for a further canvassing" respecting petitioners' allegations of bias and prejudice and favoritism on the part of Commissioners Orrick, Patterson, Hastings and Sargent. It characterizes petitioners' verified allegations of fact in that connection, recited in the petition for review (Item 1), as "wholly unsupported assertions", since "based solely upon petitioner J. Raymond Dyer's own affidavit" (Item 9, Doc. 23).

We submit that those "wholly unsupported assertions" must be taken as true. When the SEC found, as it did (Item 9, Doc. 25), that there was "lack of any valid basis for disqualification" of its said Commissioners, it could only have found their conduct, recited in petitioner J. Raymond Dyer's affidavit (Item 9, Doc. 23), to have been legally insufficient to support petitioners' charge of bias and prejudice and favoritism. The SEC demurred, as it were, to petitioners' request that said Commissioners be disqualified.

None of said Commissioners denied the truth of any of those 23 factual assertions respecting their prior conduct. They simply expressed the opinion (Item 9, Doc. 24) that they were not biased or prejudiced or otherwise disqualified. But the law of disqualification as applied to the facts asserted in petitioner J. Raymond Dyer's affidavit, not the opinion of the challenged Commissioners, is the criterion of their disqualification. The legal sufficiency of those facts, it is submitted, must necessarily be re-canvassed if certiorari is granted. The patent need for that re-canvass is a compelling reason for the granting of the writ.

When, in Sec. X of its opinion, the court below found that there was "not the slightest basis in the record" to

support petitioners' charge of bias and prejudice and favoritism, it was considering the mootness question (Pet. App. B-1, p. 85). In stating that, and that the SEC was "entitled" to have that "cloud" lifted, it was but following the English rule respecting mootness, exemplified in **Inchbald v. Robinson (1869), 4 Ch. App. 388,** wherein the court held, l. c. 395, that "the Defendant has a right to have it decided whether the Plaintiff has any ground of complaint against him". That case was cited to the court below on the mootness question, along with "**Cases in Equity that Become Moot on Appeal**", **34 HLR 416,** wherein it is annotated.

Nonetheless, in holding that there was "not the slightest basis in the record" to support petitioners' charge, the lower court must necessarily have found the 23 factual assertions recited in petitioner J. Raymond Dyer's affidavit to be legally insufficient. In effect, it held that the petition for review failed to state a claim against these four Commissioners upon which their disqualification could be ordered. On that claim it entered summary judgment for said Commissioners. And it is fundamental that when a party seeks summary judgment, as did these four Commissioners here, the facts asserted by the other party must be taken as true. **3 Barron & Holtzoff, Federal Practice and Procedure, Sec. 1235.**

There was obvious, palpable, flagrant, unreasonable error in the finding of the lower court that, taken as true, as they must have been under the law, the factual assertions respecting the conduct of these four Commissioners, were legally insufficient to support petitioners' charge of bias and prejudice and favoritism, and did not form the "slightest basis" for disqualification. Unless that error be corrected a grave miscarriage of justice will have resulted, and the effective administration of law will have been seriously hampered. If none of the 23 pleaded instances of said Commissioners' prior conduct constituted legally suffi-

cient grounds for disqualification, no member of any quasi-judicial administrative agency can ever be held disqualified, no matter what his conduct, including falsification of the record. For the documentary proof of that is in this case. See Item 9, Docs. 47 and 48.

The attempted shielding of perjury by falsification of the record is too grave a charge to leave finally disposed of under the lower court's application of the "vindication" exception to the rule of mootness. This court should undertake the re-canvass the SEC contends is unnecessary, lest the lower court's finding remain the law. To that end certiorari should be granted.

g.

On p. 6 of its brief the SEC adopts the finding of the lower court that the SEC had jurisdiction to give its 1957 order "legal operation", despite the proceedings for review of that order presently pending, and despite the provision of Sec. 24 (a) of the Holding Company Act vesting "exclusive jurisdiction" over that order in the reviewing court. It cites no basis for that finding other than the lower court's denial of a stay of that 1957 order.

Since the entry of that April 24, 1959 jurisdictional finding of the court below, based on that stay denial, the SEC has again followed that course, assuming a jurisdiction it does not possess. Under date of September 3, 1959 it permitted Union to issue 1,036,602 additional shares of its common stock (which issuance has already been accomplished) despite the fact that the lower court's affirmation of the 1958 order approving the proxy material with which management achieved stockholder sanction of that stock increase authorization without acquainting the stockholders respecting petitioners' opposition, is pending before this court.

That September 3, 1959 disregard of the jurisdictional provision of Sec. 24 (a) of the Act, without a hearing and

over petitioners' timely protest and request for a hearing, is indicative of the bias and prejudice and favoritism of Commissioners Orrick, Patterson, Hastings and Sargent. They ignored the statutory grant of exclusive jurisdiction to the reviewing court respecting that 1958 order.

If the ruling of the lower court that its denial of a stay of the 1957 order accorded to that order effective "legal operation", despite the pendency of review proceedings respecting it then before this court, was erroneous, as petitioners contend, then the SEC's September 3, 1959 treatment of its 1958 order as having effective "legal operation", since stay thereof was denied, is likewise erroneous. On that assumption petitioners have sought review in the court below of that September 3, 1959 order.

There can be no effective administration of the law if the lower court's interpretation of Sec. 24 (b) of the Act is allowed to stand. For the SEC to permit the issuance of over a million additional shares of common stock, at a subscription price of over $30,000,000, regardless of the pendency before this court of certiorari proceedings going to the heart of the legality of the authority for that issuance, is for the SEC to act in flagrant disregard, not only of the law, but of the very judicial restraint the lower court imposed upon itself when considering the mootness question below. There (Pet. App. B-1, p. 83) the lower court stated that since **Dyer v. SEC (C. A. 8, 1958), 251 F. 2d 512**, was pending in this court on petition for writ of certiorari, "it would not be proper for us to make any expression in relation to it", i. e., to its own 1958 decision. Hence, it very properly declined to "engage in any direct examination" of that "previous case".

Not so the SEC. It assumed jurisdiction in its September 3, 1959 order, citing its own 1958 and 1959 orders and the lower court's decision herein. Unlike the court below the SEC has no respect or deference for the jurisdiction of this court.

We disagree with the conclusion of the SEC, voiced on p. 10 of its brief, that "no issue of importance in the administration of the statute" is presented here. A clarification of the significance of a denial of stay applied for under Sec. 24 (b) of the Act is clearly of national importance where SEC jurisdiction to sanction stock increases by a public utility holding company is involved, and the order sanctioning the authorization of the stock is on review under Sec. 24 (a).

3.

We believe that the protection of the right of suffrage, whether in the corporate field at stockholders' meetings or in the political field at the polls, is basic and fundamental to our way of life. We also believe that where public utility holding companies such as Union are declared by Congress to be "affected with a national public interest" it is because such companies, for adequate reason, are considered properly to be subject to control by the national government for the public good.

The lower court, and the SEC in Point 3 of its brief, pgs. 6-10, pay lip service to these concepts, but fail to implement them. They both profess to abide by the declaration in **SEC v. Transamerica Corp. (C. A. 3, 1947), 163 F. 2d 511, 518**, that it was "the intent of Congress to require fair opportunity for the operation of corporate suffrage"; but what they both prescribe as "practical" implementation is actually denial. No so-called "opportunity" to protest, and make that protest known to one's fellow stockholders, is "fair" if it involves the assumption of burdens that are so costly as to be impracticable.

As stated in a recent article by David T. Bazelon, entitled "**Facts and Fictions of U. S. Capitalism**", published in the September 17, 1959 issue of **The Reporter**, p. 43, in

present day America "we are dominated by great faceless corporations 'owned' by no one and run by self-designated 'managers'". The key to that self-designation lies in the SEC's administration of the proxy rules and laws.

If By-Laws, aimed at bringing about a curtailment of management mendacity under the common law rules, re-stated in **Abrams v. Textile Realty Corp. (1949), 97 N. Y. S. 2d 492**, can be ruled off the proxy ballot on the ground that such curtailment is a management prerogative, then the decision of the lower court in the **Transamerica** case (**D. C. Del. 1946), 67 F. Supp. 326**, is the law. The SEC, p. 10 of its brief, says there is no conflict here, and there is none with that District Court decision. But that District Court decision was emphatically reversed in **163 F. 2d 511**. Certiorari was denied there, in **332 U. S. 847**. It should be granted here.

If unchecked ghost-vote proxies can be used by management in voting on proposals, and if what anywhere else would be deemed a contest is not a contest under the New York Stock Exchange Rules, then the phrase "fair opportunity for the operation of corporate suffrage" means nothing, and "stockholder democracy" has a hollow ring.

The American corporate system now represents "the highest concentration of economic power in recorded history", according to A. A. Berle. If the only way to oust the mendacious management of a public utility holding company that is subject to control by the national government for the public good is to await the mounting of an ouster campaign by some well-hedged syndicate acting in its own rather than the public's interest, then government has abdicated its control. Once that happens government itself, in effect, is contributing to the perpetuation in power of what J. A. Livingston calls the "managerial elite". When managerial mendacity is protected by government an "over-privileged" class, already tax-sheltered

and economically entrenched, is created. That was not the intent of Congress when it enacted the Holding Company Act.

4.

In footnote 1, on p. 5 of its brief, the SEC contends that by authorizing management's solicitation of proxies for the re-election of Mr. McAfee as a Union director it did not approve him as a candidate, and that, "In addition, this was not even an issue before the Commission or the court below". That it was an issue the record clearly shows: (Item 9, Doc. 35, pgs. 152, 181, 187).

True, the SEC held that Mr. McAfee's qualifications were "not an issue", which ruling the court below affirmed. It is review of that affirmation, decided generally in Sec. XI of the opinion (Pet. App. B-1, p. 86), that petitioners seek here. If it is not accorded no judicial restraint on SEC approval of conduct improper in any social sense can ever be imposed. All the SEC need say, as it did here, is "too remote"; this is "not a proper forum"; the question of disqualification is "not an issue herein" (Pet. App. A 3, p. 54).

5.

If this petition for certiorari be denied, as the SEC urges on p. 10 of its brief, no proxy contest can ever be waged in court on the basis of the disqualification of the incumbent management to succeed itself. Members of that incumbent management can do what they like to get re-elected, with no holds barred. Senators can be kept from their seats because of election improprieties, and judges too, but public utility holding company directors are immune. Even the SEC cannot hold them disqualified for re-election. It has solemnly held itself to be "not a proper forum" for the trial of disqualification questions. It can flash the green light but not the red. That is what the lower court affirmed.

In Case No. 16,205, pending below, wherein review of the SEC's 1959 proxy approving order is sought, petitioners seek the disqualification of all of Union's incumbent directors. The SEC takes the same position there as it does here. If certiorari is granted here, and this court decides this case on its merits, its decision will control the lower court's decision in that Case No. 16,205, which is set for hearing in the November 1959 session of that court. If this court does not grant certiorari herein the lower court, in all probability, will decide that case in accordance with its decision herein. It will also, in all probability, so decide Case No. 15,765, remanded to it by this court in **359 U. S. 499**. Case No. 15,765 is also set for hearing by the court below at its November 1959 session. Consolidation of those two cases, sought by petitioners, was denied.

If this petition is granted we again urge this court to hear this case on the record as submitted herewith, without need to print. The expense of printing would be unduly burdensome. Under **In re Engineers Public Service Co. (C. A. 3, 1955), 221 F. 2d 708**, adversary proceedings brought under the Holding Company Act should be encouraged, both before the SEC and before the courts.

Respectfully submitted.

J. RAYMOND DYER,
Attorney for Petitioners and
Intervening Petitioner.

October 5, 1959.

COPY

Office-Supreme Court, U.S.

PETITION

TO IMPLEMENT AMENDED MODIFIED RE-
HEARING OF ROBERT DEARING (NOT
TO CONTRADICT OR FOR NEW MATTER - MERE
CLARIFICATION OF ORIGINAL CLAIM ONLY.

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Supreme Court, U.S.
FILED
NOV 4 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

Case No. 269.

NANCY CORINNE DYER and J. RAYMOND DYER,
Petitioners,
CYRUS L. DAY,
Intervener-Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION and
UNION ELECTRIC COMPANY.

PETITION

To Supplement Record and for Rehearing of Order Denying Writ of Certiorari to the United States Court of Appeals, Eighth Circuit.

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IN THE

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OCTOBER TERM, 1959.

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NANCY CORINNE DYER and J. RAYMOND DYER,
Petitioners,

CYRUS L. DAY,
Intervener-Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION and
UNION ELECTRIC COMPANY.

PETITION

To Supplement Record and for Rehearing of Order Denying Writ of Certiorari to the United States Court of Appeals, Eighth Circuit.

Petitioners and intervener-petitioner (hereinafter sometimes collectively called "petitioners") pray the court to grant them leave to supplement the record herein by adding thereto the September 3, 1959, order of respondent ("SEC"), the review of which, under Sec. 24 (a) of the Holding Company Act, is pending in the court below in **Dyer v. SEC**, Case No. 16,347, filed October 2, 1959 (which intervening case is referred to in petitioners' October 5,

1959, reply brief herein), and also the October 21, 1959, order of the court below in that intervening case, denying stay of that SEC order. Certified copies of those two orders are presented for filing herewith, as Items 26 and 27 of the proposed supplementary record. The orders are recited in Appendix A and B hereof, respectively.

With the record herein so supplemented petitioners pray this court to grant them rehearing of its order of October 12, 1959, which denied their petition for certiorari herein, as reported in **U. S. Supreme Court Bulletin, October 12, 1959, Vol. 20, No. 2, p. 14, Case No. 269.**

Petitioners respectfully urge, for the reasons recited herein and because of the hereinafter referred to error on the face of said certiorari denying order, that the same be vacated; and that a writ of certiorari be issued in this case as prayed in the petition therefor filed August 3, 1959 herein.

REASONS FOR SUPPLEMENTING THE RECORD.

Under Rule 58 (2) of this court an intervening circumstance of substantial effect is ground for rehearing. There has been such an intervening circumstance here. On September 3, 1959, the SEC entered its order sanctioning the issuance by Union Electric Co. ("Union") of 1,036,602 shares of its allegedly "lawfully authorized" but unissued common stock.

As that order shows on its face (Appendix A hereof) petitioners, as stockholders, had protested the SEC's approval of that stock issuance on the ground that Union did not have, unissued, 1,036,602 shares of "lawfully authorized" common stock. The lawfulness depended on the legality of the 1958 orders of the SEC on review in the instant case (Pet. App. A-4 and 5, pp. 57-60). Petitioners contended that under Sec. 24 (a) of the Holding Company Act (Pet. App. A-1, p. 39) the reviewing court had "ex-

clusive jurisdiction" to "affirm" those orders, and that hence the SEC had no jurisdiction to assume them valid, and base its finding that the stock had been "lawfully authorized" on that assumption.

The SEC, relying on the decision below, **Dyer v. SEC, 266 F. 2d 33, 42** (Pet. App. B-1, p. 74) rejected petitioners' contentions and request for a hearing, and ruled that petitioners' objections "have no merit and do not provide adequate grounds for a hearing". Since there was no hearing petitioners were prevented from offering in evidence the April 18, 1958, order of the court below denying stay of the two 1958 SEC orders herein. That April 18, 1958 order (Item 8 of the record herein) shows on its face that stay was denied in the instant case because petitioners were found to lack a preponderance of the stay equities, and not because their petition for review herein (Item 1 of the record herein) was found frivolous or to lack prima facie merit. Petitioners were granted leave to brief and argue the mootness question.

On October 2, 1959, petitioners, under Sec. 24 (a) of the Act, filed with the court below their petition for stay and for review of that September 3, 1959, SEC order entered in this intervening case. Argument on the stay was heard October 16, 1959, and on October 21, 1959 stay was denied. See Appendix B hereof. Rehearing was denied October 27, 1959.

In denying stay in this intervening case the court below necessarily found that the SEC had jurisdiction to hold that its 1958 orders on review herein were valid and were entitled to be given administrative effect, despite the "exclusive jurisdiction" provision of Sec. 24 (a) of the Act. In that respect the court below followed its own decision herein (Pet. App. B-1, p. 74).

In the instant case the court below (Id., p. 73), took judicial notice of the fact (which fact is not shown in the

record herein and is not mentioned in the SEC's 1958 orders or Findings and Opinion) that stay of the SEC's March 21, 1957 order on review in the 1957 case (**Dyer v. SEC, 251 F. 2d 512; 359 U. S. 499**), had been denied. On the basis of that judicial knowledge the court below held herein that Sec. 24 (b) of the Act "allows Commission orders to have legal operation, despite the pendency of proceedings for review, unless a stay of their operation is 'specifically ordered'", and that hence the SEC could treat its unstayed March 21, 1957 order, entered in the 1957 case (though on review and still on review) as perfectly and completely unconditionally valid. Such treatment, the court below held in the instant case, was "valid and proper administrative action", and that that was so "Regardless of what might be the ultimate judicial result as to the 1957 review proceeding". That 1957 review proceeding, by remand order of this court (**359 U. S. 499**), is pending before the court below, set for hearing on the merits November 17 next.

In the instant case petitioners' Exhibit 12 (Item 9, Doc. 43 of the record herein) shows that the SEC's March 21, 1957 order was on review when that exhibit was offered and admitted in evidence, and when the SEC's 1958 orders were entered, as it still is. That fact was the basis of petitioners' contention below that the SEC had no jurisdiction to hold it valid herein. However, the court below, recognizing that said SEC order of March 21, 1957 was on review, but relying on its judicial knowledge of its own April 9, 1957 denial of stay thereof, and substituting that judicial knowledge for the SEC's finding that its assumption of the validity of its March 21, 1957 order was "in accord with the proxy rules" (Pet. App. A-3, p. 51), held that that stay denial, which was not in evidence before the SEC and on which it placed no reliance whatsoever in its Findings and Opinion and orders herein (Pet. App. A-3, 4 and 5, pgs. 41-60), operated to bestow juris-

diction on the SEC to hold it valid, as above recited (Pet. App. B-1, p. 74).

In Reason 2 of their petition for certiorari herein, p. 31, petitioners contended that that substitution by the court below of its judicial knowledge and reasoning for the SEC's failure to find stay denial as a fact, and the legal effect thereof, and its reliance on its proxy rules to give it jurisdiction to hold its March 21, 1957 order unconditionally valid, was in conflict with, and irreconcilable to, **SEC v. Chenery Corp. (1943) 318 U. S. 80, 87,** and the other cases cited on that point on p. 32 of their petition. Thus they have used up that point, and do not seek to make it again herein, though they believe it sound.

Similarly, in Reasons 3 and 4 of their petition for certiorari herein, pgs. 32-34, petitioners contended that the holding of the court below that its denial of stay in the 1957 case of the SEC's March 21, 1957 order therein rendered that order valid, and entitled it to be given unconditional administrative effect by the SEC in the instant case, was in conflict with, and irreconcilable to, the stay cases cited on pgs. 32-34 of their said petition. But, again, petitioners have used up that point, and do not seek to repeat it herein, though they believe it sound.

The point petitioners seek to make here is that said intervening Case No. 16,347 affords basis for rehearing herein under Rule 58 (2) of this court. The court below has perpetrated a palpable error, this time respecting, not the proxies of, but a large stock issuance of, a company that is "affected with a national public interest" under Sec. 1 (a) of the Holding Company Act. Under **U. S. ex rel. Eichenlaub v. Watkins (1948) 335 U. S. 867, 337 U. S. 955, 338 U. S. 521, 524,** this petition for rehearing should be granted.

In the **Eichenlaub** case it was the "cogent" argument made to the same court by the losing party in the inter-

vening case, **U. S. ex rel. Willumeit v. Shaughnessy (CA 2, 1949), 171 F. 2d 773, 775,** even though **Eichenlaub** was followed, that persuaded this court to grant rehearing. In the intervening case here the court below considered petitioners' argument sufficiently cogent to warrant expediting hearing on the merits as much as possible. See Appendix B hereof, which calls for "immediate" hearing once the time prescribed by the Rules of the court below has expired.

In addition, petitioners submit that this intervening case, which does not involve the proxy rules but instead the legality of an issue of $31,098,060.00 of questionable stock, and the payment next December (before decision of the court below on the merits can be had under the time prescribed in Exhibit B hereof, and hence probably irretrievably) of $425,006.82 in questionable dividends, gives the grant of certiorari herein an importance it previously lacked. That is ground for rehearing under Rule 58 (2). See **Paramount Publix Corp. v. American Tri-Ergon Corp. (1934), 293 U. S. 587, 528, 294 U. S. 464** and **Altoona Publix Theatres, Inc. v. American Tri-Ergon Corp. (1934), 293 U. S. 587, 528, 294 U. S. 477.**

Further, the question of the significance of denial of stay sought under Sec. 24 (b) of the Act, as distinguished (if distinguishable) from denial of injunctions or stays sought under other federal statutes is an important one, as shown by the intervening case. The same question is presented in Case No. 16,205 below, set for hearing November 17 next, the petition in which, together with the SEC's Findings and Opinion and orders therein, is shown in Item 25 of the record herein. That question has not been, but should be, settled by this court. Under Rule 19 (1) (b) that is ground for the grant of this petition for rehearing. See **White v. Texas. (1939), 308 U. S. 608; 309 U. S. 631; 310 U. S. 530.**

Finally, this intervening case, following as it does the erroneous interpretation of Sec. 24 (b) of the Act by the court below herein, constitutes a departure so far removed from the accepted and usual course of judicial proceedings (and sanctions such departure by the SEC) as to call for the exercise of this court's power of supervision. Hence this petition for rehearing lies under Rule 19 (1) (b) of this court.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1.

In the accepted and usual course of judicial proceedings the denial of stay operates to deny stay, and nothing more. It does not operate to bestow jurisdiction elsewhere than as provided by law.

In considering a stay application the court first preliminarily determines whether the petition seeking review of the order sought stayed has prima facie merit. If it finds that it does not, and is frivolous, it denies stay. See dissent of Mr. Justice Frankfurter and Mr. Justice Murphey in **In re Electric Power & Light Corp. (1949), 337 U. S. 903, 904.** If it finds that it does it then balances the stay equities and grants stay only if the applicant has a preponderance. See opinion of Mr. Justice Harlan, acting as Circuit Justice in **Breswick & Co. v. U. S. (1955), 75 S. Ct. 912, 915.**

Sec. 24 (b) of the Holding Company Act simply recites that the commencement of proceedings under Sec. 24 (a) does not, unless specifically ordered, operate as a stay. It does not say that denial of stay operates to render orders on review valid, entitling the SEC to give them unconditional administrative effect in other cases, "despite the pendency of proceedings for review", as the court below found.

When Congress enacted Sec. 24 (a) it gave the reviewing court "exclusive jurisdiction" to "affirm, modify or set aside" SEC orders on review before it. When it enacted Sec. 24 (b) it did not undo that provision. Sec. 24 (b) does not mean that a denial of stay operates to bestow on the SEC the power to hold, in one case, that its unstayed orders on review in another are **unconditionally** valid. "Regardless of what might be the ultimate judicial result as to . . . the review proceeding". The reviewing court, since it has "exclusive jurisdiction" to "affirm" all orders on review before it, is the only tribunal that can hold such orders **unconditionally** valid, just as it is the only tribunal that can "modify, or set aside" such orders, "in whole or in part". And it can do that only in the case in which those orders are on review before it, not in some other case, wherein they are not, as the court below did in the instant case and permitted the SEC to do in the intervening case.

In the instant case the court below, in effect, affirmed the SEC's March 21, 1957 order, on review in the 1957 case, after it had held the petition for review of that order in that case moot (**251 F. 2d 512**), and while its mootness judgment was pending on application for certiorari before this court. That application was ultimately granted (**359 U. S. 499**), and that mootness judgment was vacated by this court, and the cause remanded to the court below for trial on the merits, where it is presently pending. In the intervening case the court below sanctioned the September 3, 1959, finding by the SEC that its 1958 orders were valid, though the judgment of the court below affirming them (**266 F. 2d 33**) was pending before this court on application for certiorari at the time, and is now pending on this petition for rehearing.

That was obvious error in both instances. Certiorari may well be granted in the instant case, and the judgment below vacated and remanded as was the judgment in the

1957 case. But even if not, the SEC and the court below jumped the gun in the intervening case, just as they did in the instant case.

Any order, any judgment, that is on review or on appeal, is only **conditionally** valid—whether stayed or not. The grant or denial of stay does not adjudicate validity. That can only be done after trial on the merits, by entry of judgment. No order on review under Sec. 24 (a) can be said, by the SEC or by the reviewing court, to be **unconditionally** valid, and entitled to be given **unconditional** administrative effect, until it has been affirmed by the reviewing court and time for all further proceedings restricting it has expired. If the affirming judgment is vacated, and the case is pending before the reviewing court on remand, or is pending before this court on application for certiorari or for rehearing, still neither the SEC nor the reviewing court can properly hold, in another case, that because of the proxy rules, or because stay of that order was denied, it is **unconditionally** valid, and entitled to be given **unconditional** administrative effect, regardless of what might be the ultimate judicial result as to [illegible] the review proceeding.

Under Sec. 24 (a) the reviewing court has a duty to review SEC orders brought before it thereunder, and to "affirm, modify, or set aside" such orders, "in whole or in part". It has "exclusive jurisdiction" to do that, and must do it in the particular case, and may not do it in some other. Nor may it abdicate that duty, and allow the SEC to perform it, either in the particular case or in any other.

It is submitted that this clarification of petitioners' previous argument, which failed to impress the court below in the intervening case because of its decision in the instant case, authorizes rehearing herein under **Hickman v.**

Taylor (1945), 327 U. S. 808; 328 U. S. 876; 329 U. S. 495, and **Brinkerhoff-Faris Trust Co. v. Hill (1929), 280 U. S. 604; 550; 281 U. S. 673.**

2.

In its October 12, 1959 certiorari denying order herein as reported in the **U. S. Supreme Court Bulletin** of that date, **Vol. 20, No. 2, p. 14, Case No. 269,** this court found that the instant case involved the "Securities Act". That, it is submitted, is an intervening circumstance of controlling effect. Such finding by this court was demonstrable error. The petition for certiorari herein shows on its face, p. 6, under "Statutes Involved", that it involves the Public Utility Holding Company Act of 1935, not the "Securities Act". The Holding Company Act is much broader. See **Halsted v. SEC (C. A. D. C. 1950), 182 F. 2d 660, 662.**

3.

On October 12, 1959, on petitioners' motion, this court corrected an error in its May 18, 1959 judgment in the 1957 case, **Dyer v. SEC, 359 U. S. 499.** See **U. S. Supreme Court Bulletin, Vol. 20, No. 2, p. 20, Case No. 67.** That correction, petitioners submit, constitutes an intervening circumstance of substantial effect herein.

In that 1957 case, and by virtue of Rule 57 (5) of this court, no costs were taxed against the SEC. Since Union had not entered its appearance or personally participated in the proceedings before this court, and was not responsible for the sua sponte mootness judgment below, no costs were taxed against it.

Petitioners' brief in support of their motion to retax costs cited only one case, **In re Engineers Public Service Co. (C. A. 3. 1955), 221 F. 2d 708, 713,** wherein the court held that it was the intent of Congress when it enacted the Holding Company Act to encourage adversary pro-

ceedings brought thereunder, both before the SEC and before the courts.

On October 12, 1959, this court granted petitioners' motion to retax costs in that 1957 case. It recalled its judgment of May 18, 1959, and directed its Clerk to "incorporate therein a reassessment of the costs so as to provide for the payment of one half of the costs by the Union Electric Company."

It is submitted that under the circumstances of this case the denial of certiorari herein does not encourage adversary proceedings before this court, or any court, brought under the Holding Company Act (and not under the "Securities Act"). We do not mean that Congress intended that this court should grant certiorari in every Holding Company Act case brought before it, but we submit that in a case as nationally important as this case is, where the decision below is so clearly erroneous in such numerous respects (and so clearly in conflict with decisions rendered in other circuits and by this court as shown by the petition and reply brief herein), rehearing of certiorari denial should be granted. The decision below is monstrous.

The recognition given the holding in **Engineers Public Service Co.** by this court's tax reassessment in the 1957 case gives the denial of certiorari herein a judicial anomaly it previously did not possess. If this court accorded encouragement to the bringing of adversary Holding Company Act proceedings in the 1957 case, as it did by retaxing costs, it should accord even greater encouragement here, since principles, and the proper interpretation of Sec. 24 (b) of the Act, not just costs, are at stake.

4.

Under Rule 58 (2) petitions for rehearing of orders denying certiorari may be based on available grounds not previously presented, so long as they are substantial. This

section 4, and section 5 which follows it, present such available, but not previously presented, grounds. Heretofore, petitioners presented 11 Reasons for granting the writ, a full team. That team failed to make a touchdown, but there are still a few minutes left to play. So petitioners ask this court, as referee, to let them put in these two substitutes. They are both of 'varsity calibre, and should win the game.

In the instant case the court below affirmed generally (Pet. App. B-1, p. 86) all of the SEC's findings of fact and conclusions of law (Pet. App. A-3, pgs. 41-56). The general affirmation included the SEC's legal conclusion (Pet. App. A-3, p. 54) that it was not the "proper forum" in which to raise the question of "the accuracy of certain testimony of Union's president" in the 1957 case, and not the "proper forum" before which petitioners might contend that, by such false testimony and his other improper actions, that president, Mr. McAfee, had disqualified himself from seeking SEC approval of the proxy material through the use of which he sought reelection by the stockholders as a director of Union, a public utility holding company "affected with a national public interest" under Sec. 1 (a) of the Act.

The legal reason the SEC assigned for that finding was that the truth of Mr. McAfee's testimony, and his qualification as such applicant, were not in "issue" (Pet. App. A-3, p. 54). Nonetheless, the SEC relied on that testimony and that qualification in its Findings and Opinion herein.

Under this record herein (Item 9, Doc. 10, pgs. 7, 8; Doc. 12, pgs. 7-9; Doc. 21, pgs. 5, 6, 8, 9; and Doc. 31; pgs. 9, 12) petitioners placed those questions in issue. Mr. McAfee's false testimony and disqualification were the subject matter of petitioners' special brief below (Item 18 of the record herein), which brief was based on the Channel 10 Miami television scandal case of **WKAT, Inc., v. FCC (C. A. D. C., 1958), 253 F. 2d 418.**

That scandal had broken before the SEC hearing herein was had. At that hearing petitioners sought to place the untruth of Mr. McAfee's March 13, 1957 testimony in the 1957 case, and his various other improper actions going to his disqualification as an applicant for an order of the SEC permitting Union's 1958 proxy material to become effective, in evidence. See Item 9 of the record herein, Doc. 35 (the transcript of the SEC hearing below), pgs. 154-190. However, in each attempt petitioners made to question Mr. McAfee about those matters the Hearing Examiner sustained objections. Petitioners objected to those rulings, took exceptions, asked for SEC rulings which were denied, and made offers of proof. But the SEC found petitioners' objections to be "without merit" (Pet. App. A-3, p. 54). That was a legal conclusion, which the court below, without commenting thereon, generally affirmed.

The SEC's findings that it was not the "proper forum", and that Mr. McAfee's qualification was not "an issue" (and that petitioners' objections to those rulings of the Hearing Examiner were "without merit") were erroneous. When the court below affirmed those findings, generally, that was erroneous, too. See **Precision Instrument Mfg. Co. v. Automotive M. M. Co. (1945), 324 U. S. 806; Keystone Driller Co. v. General Excavator Co. (1933), 290 U. S. 240; FCC v. WOKO, Inc. (1946), 329 U. S. 223; Mas v. Coca-Cola Co. (CA 4, 1947), 163 F. 2d 505; WKAT, Inc. v. FCC (CA DC 1958) 258 F. 2d 418.** and the other disqualification cases cited on p. 31 of the petition for certiorari herein.

Hence the decision below is not only in conflict with those cases, as heretofore urged, but is also (and as not heretofore presented) in conflict with and irreconcilable to the decision of this court in **SEC v. Chenery Corp. (1942), 318 U. S. 80,** wherein Mr. Justice Frankfurter said, l. c. 87:

"The grounds upon which an administrative order must be judged are those upon which the record discloses its action was based."

5.

Similarly, the decision of the court below (Pet. App. B-1, p. 85), that there was "not the slightest basis in the record" for petitioners' charge, made in their petition for review (Item 1, pgs. 2, 3), that Commissioners Orrick, Patterson, Hastings and Sargent were biased and prejudiced, is in conflict with and irreconcilable to **SEC v. Chenery Corp., 1, c. 88.** As Mr. Justice Frankfurter there said, "a judicial judgment cannot be made to do service for an administrative judgment . . ., an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."

The SEC did not find that there was no "basis **in the record**" for petitioners' charge of bias and prejudice, as did the court below. The challenged Commissioners said they were not biased and prejudiced (Item 9, Doc. 24), but that is not the same thing. The SEC said (Item 9, Doc. 25) that there was "lack of any valid basis for disqualification," but it based that legal conclusion solely on the facts recited in petitioner J. Raymond Dyer's affidavit (Item 9, Doc. 23).

The legal conclusion of the court below was based on the whole record, which included not just that affidavit, but also the petition for review, all of petitioners' excluded exhibits, and particularly petitioners' excluded Exhibits 7 and 8 (Item 9, Docs. 47 and 48). When those two exhibits are compared, one being purportedly a "copy" of the other, they show falsification of Exhibit 8, the purported "copy". That, in and of itself alone, is basis for the charge in the petition for review herein (Item 1, pgs. 2, 3), that said Commissioners were biased and prejudiced

when they authorized the change in the record made by the Department of Justice, in order to shield the false testimony of Mr. McAfee. See **Root Refining Co. v. Universal Oil Products Co. (CA 3, 1948), 169 F. 2d 514; Trans World Airlines, Inc. v. CAB (CA DC 1958), 254 F. 2d 90; WKAT, Inc. v. FCC (CA DC 1958), 258 F. 2d 418,** and the other disqualification cases cited on p. 31 of the petition for certiorari herein.

The court below was considering the mootness question when it found that there was "not the slightest basis in the record" for petitioners' charge of bias and prejudice. See Pet. App. B-1, p. 85. It made that statement in support of the English "vindication" exception to the mootness rule. That exception, as stated in **Inchbald v. Robinson (1869), 4 Ch. App. 388, 395,** cited and quoted in **"Cases in Equity that Become Moot on Appeal", 34 H. L. R. 416, 417,** is that "the Defendant has a right to have it decided whether the Plaintiff has any ground of complaint against him". See petitioners' reply brief herein, pgs. 3, 4.

Such a finding, when based on the whole record by the court below, for such a purpose, may not be used to bolster up an administrative finding that is based on only part of the record, and is not contained in the findings on which the orders complained of were based. The decision below is in conflict with and irreconcilable to **SEC v. Chenery Corp.**, supra. A judicial judgment cannot be made to do service for an administrative judgment. Nowhere in its Findings and Opinion (Pet. App. A-3, pgs. 41-56), upon which, and which alone, its orders of March 21 and 25, 1958 were based, did the SEC find, as did the court below, that there was "not the slightest basis **in the record**" for petitioners' charge that Commissioners Orrick, Patterson, Hastings and Sargent were biased and prejudiced. The court below re-tried this case. It did not review the SEC's findings; it substituted its findings in an ancillary matter for the SEC's lack of finding in the particular matter.

CONCLUSION.

For the reasons set forth above and in the petition for certiorari herein it is urged that the record herein be supplemented as hereinabove prayed; that rehearing herein be granted under the record as so supplemented; and that, upon such rehearing, the order of October 12, 1959, be vacated and a writ of certiorari be issued in this case to the court below as prayed.

Respectfully submitted,

J. RAYMOND DYER,
Attorney for Petitioners and
Intervener-Petitioner.

Certificate of Counsel.

I certify that the foregoing petition is presented in good faith and not for delay, and that it is restricted to grounds specified in Rule 58 (2) of the Rules of this court.

J. Raymond Dyer,
Attorney for Petitioners and
Intervener-Petitioner.

Dated: November 2, 1959.

APPENDIX.

APPENDIX A.

Exhibit A.

(Holding Company Act Release No. 14051.)

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
September 3, 1959

In the Matter of UNION ELECTRIC COMPANY File No. 70-3810 (Public Utility Holding Company Act of 1935)	Order Authorizing Underwritten Common Stock Offering to Stockholders and Offering of Unsubscribed Shares to Employees.

Union Electric Company ("Union"), a registered holding company, has filed a declaration and amendments thereto with this Commission pursuant to Sections 6 (a) and 7 of the Public Utility Holding Company Act of 1935 ("Act") and Rule 50 promulgated thereunder regarding the following proposed transaction.

Union proposes to offer to the holders of its outstanding shares of common stock, for a period of 19 days, 1,036,602 shares of its authorized but unissued common stock ("Additional Common Stock"), par value $10 per share, on the basis of one share of Additional Common Stock for each ten shares of common stock held of record, at a price per share ("Subscription Price") to be determined by Union's Board of Directors. Such price will be not less than 8% under the closing price per share of Union's common stock on the New York Stock Exchange on the date of such de-

termination. Union proposes to issue to its common stockholders transferable subscription warrants evidencing the right to subscribe to Additional Common Stock. No fractional shares will be issued, but rights evidenced by the subscription warrants may be bought or sold through banks and brokers. Union expects that such rights will be traded on the New York Stock Exchange. The company will make arrangements with its subscription agents whereby a warrant holder may place an order for the purchase or sale of rights to round out his subscription to full shares or for the sale of all or a portion of the rights evidenced by his subscription warrant. The Hanover Bank has been selected as the New York Subscription Agent; St. Louis Union Trust Company (Union's St. Louis Transfer Agent), which will process routine subscriptions only, has been selected as the St. Louis Subscription Agent.

Union also proposes to offer to regular full-time employees (excluding elected officers) of Union and its subsidiaries, Missouri Power & Light Company and Missouri Edison Company, nontransferable privileges to subscribe, at the Subscription Price, for such of the shares of Additional Common Stock as are not subscribed for through exercise of the rights issued to stockholders. Employee subscriptions are to be limited to a maximum of one share for each full $10 of monthly salary or earnings based on a normal forty hour week, but no subscription is to be for less than 10 nor more than 100 shares. Such subscriptions are to be allotted pro rata in the event there is insufficient Additional Common Stock available, except that no subscription will be reduced to less than ten shares. If the number of shares available should be insufficient to allot at least ten shares to each subscribing employee, the available shares will be allotted equally.

The offering of the Additional Common Stock is to be underwritten, and Union will invite proposals, pursuant t

the competitive bidding requirements of Rule 50 promulgated under the Act, for the purchase, at the Subscription Price, of such shares of Additional Common Stock as are not subscribed for through the exercise of subscription warrants or through the exercise of employee subscription privileges.

The net proceeds from the sale of the Additional Common Stock, estimated by Union to amount to approximately $31,100,000, will provide funds to partially reimburse the company's treasury for capital expenditures heretofore made, to retire short-term bank loans, to finance in part the cost of continuing additions and improvements to its utility plant, and for other corporate purposes. It is expected that such short-term bank loans will aggregate approximately $28,000,000 by the time the Additional Common Stock is sold.

The Public Service Commission of Missouri and the Illinois Commerce Commission have authorized the issuance and sale of the Additional Common Stock. No other State commission and no Federal commission, other than this Commission, has jurisdiction over the proposed transaction.

The fees and expenses to be incurred by Union in connection with the proposed transaction are estimated at $259,000, including fees and expenses of Messrs. Keefe, Schlafly, Griesedieck & Ferrell, counsel for the company, $12,500; fees and expenses of Price Waterhouse & Co., accountants, $8,500; fees of Subscription Agents, $34,000; and charges of Transfer Agents and Registrars, $29,800. The fees of Messrs. Cahill, Gordon, Reindel & Ohl, counsel for the underwriters, are estimated at $13,500 and are to be paid by the successful bidders.

Due notice was given of the filing of said declaration, as amended, in the manner prescribed by Rule 23 pro-

mulgated under the Act (Holding Company Act Release No. 14044). That notice provided that any interested person might request that a hearing be held, or that he be notified if the Commission should order a hearing on the matter; J. Raymond Dyer, on behalf of his daughter Nancy Corinne Dyer and himself as owners of 250 shares of Union's common stock, has filed a statement which requests that he and his daughter be notified if the Commission should order a hearing, but it is not clear whether they request that a hearing be held. Treating the statement as a request for a hearing, it appears therefrom that the basis of their objections to the proposal of Union is that the company does not have 1,936,602 shares of its common stock lawfully authorized and unissued. This contention is based upon the assertion that this Commission acted invalidly in permitting Union to solicit its shareholders in 1958 to obtain proxies to increase the number of its authorized common shares by 1,500,000. The Dyers also contend that this Commission does not have jurisdiction to determine the validity and effect of its previous orders which are under review. We have previously rejected such contentions (Union Electric Co., Holding Company Act Release Nos. 13710 [March 21, 1958] and 13712 [March 25, 1958], aff'd sub nom. **Dyer v. S. E. C.**, 266 F. 2d 33 [C. A. 8, 1959]; petition for certiorari pending, No. 269, Oct. Term, 1959; and **Union Electric Co.**, Holding Company Act Release Nos. 13962 [March 26, 1959] and 13965 [March 27, 1959], petition for review pending [C. A. 8, No. 16295]; and

The Commission having considered the request of the Dyers and having concluded that their objections have no merit and do not provide adequate grounds for a hearing; and

The Commission having considered Union's declaration, as amended, and finding that the applicable standards of

the Act and the rules promulgated thereunder are satisfied and that no adverse finding are necessary; and the Commission deeming it appropriate to the public interest and in the interest of investors and consumers that said declaration as amended be permitted to become effective:

It is ordered, pursuant to the applicable provisions of the Act, and rules thereunder, that said declaration as amended be, and hereby is, permitted to become effective forthwith, subject to the terms and conditions prescribed in Rules 24 and 50 promulgated under the Act.

By the Commission.

Orval L. DuBois,
Secretary.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 16347 September Term, 1959

Nancy Corinne Dyer and J. Raymond Dyer, Petitioners, vs. Securities and Exchange Commission.		Petition to Review Order of Securities and Exchange Commission.

On consideration of petitioners' application for a stay herein, after submission thereof on briefs and oral argument by petitioners and by intervenor-respondent and on written statement filed by respondent, it is ordered that said application be and hereby is denied.

The case will be set for hearing on the merits immediately after the record and briefs have been filed in accordance with the Rules of the Court.

October 21, 1959.